Petition

CORRECTED COPY

NO. 81-1797

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEATRE TECHNIQUES, INC.,

Petitioner,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. CROSSIN
65 Prospect Avenue
Larchmont, N.Y. 10538
(914) 834-5441

Counsel for Petitioner

Dick Bailey Printers 290 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

The questions presented must be considered in light of the conflict between the decision of the Second Circuit in this case and Supreme Court decisions in prior cases concerning issues of national importance. Specifically, the reconciliation of the antitrust and labor laws, and the fundamental requirements of due process. Therefore, the questions presented for review in this petition, under these circumstances are:

1. In view of the Supreme Court's decisions in *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965) and *Connell Construction Co. v. Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975).

a) Is an employer-union agreement seeking to prescribe labor standards outside the bargaining unit exempt from the antitrust laws?

b) May an employer-union agreement lawfully require that the union impose on other employers wages that are significantly higher than those paid by the contracting employer?

c) In order "to maintain equitable competitive standards within the industry" may a union legally attempt to equalize non-labor costs among employers?

2. In view of the Supreme Court's decisions in *Provision Salesmen & Distributors v. United States,* 393 U.S. 480 (1969); *Los Angeles Meat and Provisions Drivers Union v. United States,* 371 U.S. 94 (1962); and *American Medical Assn. v. United States,* 317 U.S. 519 (1943).

a) Are an employer-union agreement and other union activities prohibiting competition with independent contractor members of the union exempt from the antitrust laws?

b) Is a union-employer agreement which prescribes compensation for independent contractor members of the

union exempt from the antitrust laws?

3) In view of the Supreme Court decisions in *Fillippon v. Albion Slate Co.*, 250 U.S. 76 (1919); *Continental Ore Co., et al v. Union Carbide & Carbon Corp.*, 370 US 690 (1962); and *Beacon Theatres Inc. v. Westover*, 359 U.S. 500, (1959).

a) Is the plaintiff denied its right to a jury trial by the court's exclusion from the jury of all evidence that the defendant union had agreed with certain employers to impose specified wage and hour standards on the plaintiff and other employers in the plaintiff's industry?

b) Is the plaintiff denied due process by the court's rulings that for the purpose of excluding evidence of conspiracy that certain payments were not "wages", whereas these same payments were ruled to be "wages" for the purposes of determining the defendant union's exemption from the antitrust laws?

c) Is it prejudicial error for the trial court, after failing to comply with the jury's request for a rereading of the charge, to send ambiguous interrogatories, not previously seen by counsel, directly to the jury during its deliberations?

d) Is it prejudicial error to exclude evidence that a conspiracy existed in an industry prior to petitioner's entry into that industry, when the petitioner was injured by acts in furtherance of that conspiracy?

TABLE OF CONTENTS

Page

Questions Presented i

Index to Appendices v

Table of Authorities vi

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

A. Introduction 3
B. Facts 4
C. Proceedings Below.....7

Reasons for Granting the Writ 12

I. By prohibiting consideration of the favored nations clause by the jury, the courts below established principles of labor/antitrust law and due process contrary to the decisions of this court 13

A. The decisions of this Court have clearly established that the favored nations clause was not an innocuous irrelevancy that was properly kept from the jury 13

B. By judicial determination of the facts, the courts below denied TTI its right to a trial by jury 15

C. The decision of the Circuit Court offends the basic tenet of due process: reasonableness 18

II. United may not lawfully shelter New York City employers from competition 19

A. The affirmed rulings of the trial court erroneously led the jury to believe that United could legally use its labor contracts to equalize non-labor costs among competing employers 20

B. The per diem clause was a direct market restraint which is prohibited by antitrust law and not justified by labor policy 21

III. The decision of the court below in regard to the jury instructions is in direct conflict with this Court's decision as to labor exemption from the antitrust laws and was otherwise improper 23

A. The charge to the jury was clearly erroneous 23

B. The interrogatories submitted to the jury, without review by Counsel, misdirected the jury's verdict for United 24

IV. TTI preserved its objections to the charge.....26

V. The affirmed denial of a directed verdict to TTI on the designer issue is contrary to the decisions of this court 27

A. United engineered a group boycott and price fixing 27

B. United was not entitled to the labor exemption from the antitrust laws 28

Conclusion 29

INDEX TO APPENDICES: **Page**

Appendix A:
Second Circuit Decisions
Affirmance of Judgment A1
Denial of Rehearing A4

Appendix B:
Judgment in the District Court B1
Special Verdict Form (Interrogatories to Jury) . . . B2(3)

Appendix C:
District Court Decisions
Opinion and Order, J. Metzner, dated October 31, 1979, on defendants' summary judgment motion and plaintiff's cross-motion for summary judgment, 1980-81 CCH Trade Cases ¶63,031 (SDNY 1979). . C1

Opinion and order, J. Metzner, dated January 9, 1980, as to the relevancy of the independent contractor status of the designers in this litigation, 483 F.Supp. 104 (SDNY 1980).....C8

Opinion and order, J. Metzner, dated June 27, 1980, on plaintiff's motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Rule 403 of the Federal Rules of Evidence for judgment as to certain of defendants' affirmative defenses and excluding prejudicial evidence at trial C14

Opinion and order, J. Metzner, dated June 27, 1980, on defendants' motion to disqualify plaintiff's counsel C20

Amendment by J. Metzner, dated August 4, 1980, of decision denying defendants' motion to disqualify plaintiff's counsel C23

Amendment by J. Metzner, dated September 15, 1980, of decision on plaintiff's motion for judgment as to certain of defendants' affirmative defenses..C24

Opinion and Order, J. Metzner, Dated November 7, 1980, as to Trial Issues C25

Appendix D:
Charge of the Court to the Jury D1
Complaint D12

TABLE OF AUTHORITIES

CASES: *Page*

Allen Bradley Co. v. Local 3 Int'l Brotherhood of Electrical Workers, 325 U.S. 797 (1945) 21,25

American Medical Association v. United States, 317 U.S. 519 (1943) i,28

Associated Press v. United States, 326 U.S. 1 (1945) 29

Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959)ii,18

Brown v. Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979) 27

Clayton v. Burston, 493 F.2d 429 (5th Cir. 1974).....27

Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir. 1973), cert. den. 414 U.S. 857 (1973) 27

Connell Construction Company, Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) i,14,15,18,21,22,23,24

Continental Ore Co., et al. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) ii,18

Dixie-Land Iron & Metal Company, Inc. v. Piedmont Iron & Metal Company, 583 F.2d 717 (5th Cir. 1978)....25

Federal Maritime Commission v. Pacific Maritime Assn., 435 U.S. 40 (1978) 21

Federation of Musicians v. Carroll, 391 U.S. 99 (1968) 24

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919)ii,25

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).....29

Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) 22

Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94 (1962) i,28

Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979)....27

Norfolk Monument Co. Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969) 17

Provision Salesmen & Distributors v. United States, 393 U.S. 480 (1969) i,28

Ramsey v. United Mine Workers of America, 401 U.S. 302 (1971) 14

Rogers v. United States, 422 U.S. 35 (1975) 25

Theatre Techniques v. United Scenic Artists, Local 829, 483 F.Supp. 104 (S.D.N.Y. 1980) 2,8

Theatre Techniques v. United Scenic Artists, Local 829, 1980-81 CCH Trade Cases ¶63,031 (S.D.N.Y. 1979) 2,8,13,22

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) i,8,13,14,18,21,22,25

United States v. General Motors Corp., 384 U.S. 127 (1966) 16

United States v. United Scenic Artists, Local 829, 27 F.R.D. 499 (S.D.N.Y. 1961) 29

West v. Smith, 101 U.S. 263 (1869) 16-17

STATUTES:

§1 of the Sherman Act (15 U.S.C. §1) 2

§2 of the Sherman Act (15 U.S.C. §2) 2

§6 of the Clayton Act (15 U.S.C. §17) 2

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THEATRE TECHNIQUES, INC.,
Petitioner,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Theatre Techniques, Inc. ("TTI") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 16, 1981.

OPINIONS BELOW

The opinions of the Court of Appeals, not reported, appear in Appendix A hereto. A copy of the judgment of the District Court for the Southern District of New York is included in Appendix B, and copies of district court decisions are included in Appendix C; two of these decisions

were reported at 1980-81 CCH Trade Cases ¶63,031 (S.D.N.Y. 1979), and 483 F.Supp. 104 (S.D.N.Y. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 16, 1981. A timely petition for rehearing *en banc* was denied on January 4, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. §1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

2. §2. of the Sherman Act (15 U.S.C. §2) provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

3. §6 of the Clayton Act (15 U.S.C. §17) provides, in pertinent part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of

labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

STATEMENT OF THE CASE

A. INTRODUCTION

This is an anti-trust action brought by TTI, a scenery manufacturer or shop located in Newburgh, New York. The defendant, United Scenic Artists, Local 829 ("United") is an unincorporated association which purports to be a labor union.[1] Its membership consists of designers of scenery, lighting, and costumes, and artists who paint scenery. United has jurisdiction over the work of its members in all states on the eastern seaboard of the United States from Maine to Florida. (24).[2] However, it has one office which is located in New York City, and most of its members live in or near New York City. (248).

In its complaint TTI claimed that United had agreed, combined and conspired with non-labor groups (independent contractor designers and New York City scenery shops) to restrain trade and to monopolize the New York City market (D12-26).

---

1. The remaining defendants are officers of United and together with it are collectively referred to herein as "United".

2. Parenthetical references preceded by letters "A" to "D" indicate pages in the Appendices attached to this petition. The numerical references indicate pages in the appendix and exhibit volumes ("P") filed in the Circuit Court.

B. FACTS

The subject of this lawsuit is the scenic supply industry, which produces the sets used for theatrical, television, and motion picture presentations. There are two major aspects in supplying scenery—designing it and building it—and, as demonstrated at trial, United controls both of them.

When scenery is needed for a theatrical production, the producer hires a scenic designer to do diagrams and miniature models of the scenery. Although they carry union cards, United's scenic designers are not employees but independent contractors—a finding made by the jury (B3), and found by the NLRB in proceedings brought against United in 1975. (155-56 [excluded]).

The designers, through United, completely control access to the scenic supply market in the area where United exercises exclusive jurisdiction—the entire eastern seaboard for theatrical and motion picture work, and New York City for television work (24, P12). By reason of United's contract with the League of New York Theatres and Producers, Inc., every production presented on a New York City stage must "employ" United designers for set, lighting, and costumes. (304, 491-93; P 74, 76).[3]

---

3. United's hammerlock on the scenic industry was hardly accidental. TTI offered, but the court excluded, evidence going back to the 1920's to show how the designers dominated United and had, in fact, created it as an instrument to drive the scenic packagers out of business. See P217-23; *see also* 147-58.

United's entrenchment in the scenic supply market had not gone unnoticed by the Department of Justice, which had procured a 1963 consent decree which prohibited United from coercing "any [scenic shop] or costume manufacturer to refrain from commencing and performing work for any producer because the designers of scenery, costumes or lighting were designed by a contract designer who is not a member of [United]" (P93-94).

The designers can exercise this power because of United's other members, scenic artists, who are hired by the United chargeman or foreman appointed for each scenery shop (354, 622). The chargemen look for the designers' United union label before permitting their artists to pick up a paintbrush (A249; P. 11). If one could paint the sets without United scenic artists, the stagehands employed by other theatrical unions would not move it (359). Moreover, to prevent potential competition from scenic supply shops, which formerly designed, constructed and produced complete sets, United makes each of the scenic shops agree as a condition for hiring United artists, that it will *not* hire United designers (P 58).[4]

With all this power, United faced the problem that, while it claimed exclusive jurisdiction from Maine to Florida, its only office and the majority of its members lived in or near New York City (248; P224). If scenic suppliers located outside New York could take business away from the shops located in New York City, not only would the employers located there lose business but so would the designer (independent contractor) members of United who undisputedly are the majority of United's members (239a).

To counteract this problem United became involved in two schemes. The first was a refusal to permit scenic artists who lived in the vicinity of scenery shops located outside New York City to work in those shops (496-97). The second—which ultimately drove TTI out of competition—a provision in the collective bargaining agreement between United and employers called a per diem clause. This clause, which existed in all United collective bargaining agreements since 1962 required employers located outside New York City to pay United artists $30 per day over that required to be paid to such artists by employers

4. The sole exception to the no-hire procision is television production, where scenic shops are permitted to employ designers if they are guaranteed a minimum of 13 weeks pay no matter how little they worked. (711-13, P27).

located in New York City, or as United's business agent called it, "special rates for being outside the NYC area." (P155, D19-20).

Another provision that existed in the United collective bargaining agreements since at least 1958 was a "favored nations" clause:

> "20. *No More favorable Contracts With Others:*
> To maintain equitable competitive standards within the industry, no agreement providing for minimum wages lower than, or maximum hours higher than those provided herein will be made by Local 829 with any independent contractors furnishing scenery to theatres, networks and film studios." (P34, D19).

United's collective bargaining agreements normally were of a three-year duration. In 1973 one expired and several independent scenic shops formed a non-profit corporation, Theatrical Contractors Association, Inc. ("TCA") to negotiate with United (283). There were seven active members of employers in TCA: five were located in New York City and two outside New York City. The two non-New York City members withdrew from TCA before the TCA-United contract was signed because of lack of support from the New York City members in eliminating the per diem provision from the contract. (376, P191, P162).[5]

5. In 1973, United modified the per diem clause by requiring that it would not be required if the artist lived within ten miles of the non-New York City shops. However, it was not applicable to the New York City shops no matter how far the artist lived from the shop (P29). Indeed, the 1973 contract imposed a flat $30 per diem on every worker employed at Jones Beach, "no matter where he lives" and regardless of whether any travel time was necessary (P30). In terms of ascertaining the intent of this provision, it is worth noting that the scenic supplier who had done the Jones Beach productions since 1972, Theatrical Equipment Company, was neither a member of TCA nor participated in the negotiation of that provision (397-99).

In November 1974, TCA instituted an arbitration against United to enforce the favored nations clause as to United's contract with the television networks. (P173, 176). After a hearing the arbitrator held that the clause was not applicable to the television networks, but that it was limited to scenery shops (P180-82).

In 1975, TTI commenced business outside New York City. Its president Peter Feller attempted to negotiate a collective bargaining agreement with United. United's business agent, Abe Kanter, refused to do so and insisted that TTI sign the TCA-United contract (956, 290). At trial, the Court excluded all mention of the favored nations clause before the jury. Nevertheless, the testimony, so censored, made it clear that United considered itself bound by this clause to impose all the terms of the TCA contract on TTI (296, 783, 871).

Feller signed the United/TCA contract "under protest" (514-15). At the end of the contract's term in December 1976, TTI stopped doing its own painting and started subcontracting the paint work to another shop. Feller testified: "There was no point in continuing that effort unless I could make some money on it. It became a serious problem and I dropped it."[6] (303).

C. PROCEEDINGS BELOW

The trial was confined to the issue of liability.

Prior to trial the Court denied United summary judgment twice, and in each decision the court stated that it was ruling on TTI's Sherman Act §§1 and 2 claims: New

6. The scenery shop who picked up the painting was located in New York City, and a member of TCA (284). The anticompetitive effect of the per diem was also testified to by the owners of other scenery shops located outside of New York City: Atlas of Connecticut (407); National of Virginia (384-5) and Studio III of Connecticut (352).

York City shops (C1), 1980-81 CCH Trade Cases ¶63,031 and Designers (C8), 483 F.Supp. 104.

In denying summary judgment to United on TTI's claim concerning the New York City scenery shops, the trial court stated, as to the per diem:

> ". . . the anticompetitive effect of the increased cost of labor to firms outside of New York City is obvious." (C5).

And, in the same decision, the judge, relying on this Court's decision in *Pennington, supra,* stated, as to United's agreement with the New York City shops:

> "If the [favored nations] clause here does seek to impose conditions on non-contracting parties, that will be sufficient to remove the exemption from the antitrust laws." (C4).

However, on the first day of trial, the court, *sua sponte,* entered an order dismissing TTI's monopolization claims because they were not adequately pleaded or argued in pretrial motions (C26-27), and in the same order struck the "favored nations clause" from the case:

> "The most favored nations clause is not a restraint of trade in the context of this complaint. It reflects only the basic position of the union regarding compensation and hours of labor. It exists in this contract between the union and the employers fo the union's membership. *It is obviously there for the protection of the employer who signs up with the union on the premise that the union will not thereafter give one of its competitors a better break".,* (C26, Emphasis added).

During the trial the court excluded all evidence in regard to the favored nations clause (240-41, 296, 334, 567, 759-60, 849-53, 959, 975). At the same time the court

ruled that the per diem was a "wage clause" (988, 174) and its charge to the jury twice told them "per diem affects the wages of scenic artists." (D4, D6).

The trial court took the view that it was proper that the union cont[illegible]t serve to equalize the non-labor costs (e.g. rent) of employers in order to affect competition among the employers (557-58). Over the objection of TTI, the court continually permitted United to put in evidence the non-labor operating costs of the New York City scenery shops *vis a vis* the out-of-town scenery shops. (411, 626-27, 792).

Similar to the trial courts exclusion of the favored nations clause from the jury was its treatment of the designer issue. The trial court limited the jury's consideration of the impact that designers have on the decisions of United to the number of its set designer members. In doing so the court ignored the fact that United prohibited any of its designer members from working unless all the designer functions (sets, lighting, and costumes) were performed by one of its members.[7]

At the end of TTI's case, the Court heard extensive arguments of counsel on United's motion to dismiss (Trial Trans. pp. 461-515; 538-585), and again at the end of the entire case the Court heard extensive argument on

7. This practice was admitted in United minutes (P122); dictated by United's current Constitution and Bylaws Articles at IX, B, 1, b (all designs must be registered with United before any work is started) IX, B, 4 (all designs must bear a United stamp) (P10-11), and by the trial testimony that all designers for scenery, lighting, and costumes must be United members (491-94). Throughout the trial the jury heard testimony of set, costume and lighting designers in theatre, films, and TV (422, 425, 459-60, 463-64), including United's own witness who testified as to his set and costume designing for the play "Rex" (918, 924, 932). In those few instances where non-United designers were permitted to work, United imposed exhorbitant fees ($2,500-$4,500, 610) on them or made the producer retain a "supervisory designer" (493).

United's motion for a directed verdict (Trial Trans. pp. 978-1022; 958-984). The Court reserved decision on these motions. TTI's requests to the charge included instructions, *inter alia,* as to evaluating the anit-competitive impact of the per diem clause (170-171), and the labor exemptions (173-74). The court "denied except as charged" TTI's labor exemption requests (987-88) and, in response to TTI's inquiry, said it was not providing counsel with a copy of the charge (984). Immediately before the charge was given, the court would not permit TTI to move in regard to the jury instructions and advised TTI's counsel: "You will do that after I charge the jury." (998).

The charge that was given to the jury made it logically impossible for them to find that United had forfeited its exemptions from the anti-trust laws. The court charged the jury that United enjoyed the statutory and non-statutory exemptions from the anti-trust laws. In regard to these exemptions the trial court first told the jury that United could forfeit the statutory exemption only if it conspired with the New York City shops to put the per diem clause in the contract. It then said to the jury that even if United had combined with the New York shops it would still be exempt under the non-statutory exemption if per diem was intimately or intermittently related to wages. To complete the circle, the court instructed the jury that "per diem affects the wages of scenic artists." (D4-6).

Subsequent to the charge the Court entertained only exceptions to the charge (1031). TTI made the following exceptions, all of which were denied.

1) ". . . inasmuch as the favored-nations clause was kept out of the case and it was held to be binding the union with respect and for the benefit of the Theatrical Contractors Association, that the jury should be instructed that there is no statutory exemption, . . ."

2) ". . . with respect to the non-statutory exemption, that the jury be instructed, inasmuch as the per diem has been determined to be a wage, subject to the favored nations clause, that that, too, shall be taken from the case."

3) ". . . that the union refused to negotiate any terms would also take out the non-statutory exemption."

4) "There was an obvious restraint and it should be a waiver of the non-statutory exemption." (1028-29).

Shortly after the jury retired, they requested a copy of the main charge excluding the introduction and conclusion (1034). The Court did not repeat any of the charge to the jury (1044-45) but directly sent them interrogatories (B3) which were not previously seen by counsel for the parties.

The interrogatories and the jury's answers were:

"1. Did the plaintiff prove that the scenic designers are independent contractors? *Yes*

2. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract as the result of a conspiracy between Local 829 and the New York City shops? *No*

3. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract for the purpose of benefiting the scenic designers and not for the benefit of the scenic artists? *No*

4. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract as the result of a conspiracy between the scenic designers and the New York City shops? *No*"

Judgment for United was entered in the district court on November 26, 1980 (B1).

The Second Circuit affirmed the judgment on the grounds that: (a) the trial court properly excluded from the trial the favored nations clause in the contract at issue based on its interpretation, of an unambiguous writing, that the favored nations clause did not apply to the per

diem clause; (b) TTI failed to preserve its objections to the charge , and there was no prejudicial error in the charge; (c) the trial judge should have given counsel copies of the interrogatories submitted to the jury but such was not prejudicial error; (d) the trial court properly excluded from the trial TTI's monopolization claims because they were not adequately pleaded and there was no evidence to support them; and (e) TTI's other contentions as to evidentiary rulings by the trial court were without merit. (A1-3)

REASONS FOR GRANTING THE WRIT

The principle of *stare decisis,* and this Court's obligation to supervise the lower courts require its review of the matters vital to the United States economy and judicial processes that are at issue here. This decision indirectly affects every employer and litigant: it directly affects the entire scenery construction industry in the Eastern United States. United uses its multistate jurisdiction—from Maine to Florida—not for the valid labor purpose of representing employees but instead for the prohibited purposes of allocating the market to New York City employers and furthering the individual business interests of its independent contractor members.[8] The decisions of the courts below that allow United to perpetuate this illegal oligarchy are in direct conflict with the decisions of this Court.

---

8. Inasmuch as United's jurisdiction encompasses employers located both in and outside of New York City, this policy did not preserve jobs for its employee members. In fact it was counterproductive to the interests of the artists working outside of New York City shops because it eliminated their jobs (303, 402) and their mobility to live where they chose to live. (646).

I.

BY PROHIBITING CONSIDERATION OF THE FAVORED NATIONS CLAUSE BY THE JURY, THE COURTS BELOW ESTABLISHED PRINCIPLES OF LABOR/ANTITRUST LAW AND DUE PROCESS CONTRARY TO THE DECISIONS OF THIS COURT.

At one point in the proceedings, in refusing to grant summary judgment to United on petitioner's claim of conspiracy between United and the New York scenic suppliers, the trial court recognized the relevance of the most favored nations clause:

> "If the clause does not seek to impose conditions on non-contracting parties, that will be sufficient to remove the exemption from the antitrust laws." (C4)

However, immediately before the start of the trial, the Court became convinced the clause had no relevance and excluded all evidence of it from the jury during the trial. The Circuit Court upheld this treatment of the clause.

A. *The decisions of this Court have clearly established that the favored nations clause was not an innocuous irrelevancy that was properly kept from the jury.*

The favored nations clause which is at issue here is the type of arrangement addressed in *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965). In that case, this Court considered whether the purpose of the "Protective Wage Clause" in the UMW's collective bargaining agreement was to have a union impose its agreement with one set of employers upon other employers who were not represented in the bargaining process. Mr. Justice White, writing for the Court, stated:

> ". . . [W]e think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." *Id.* 381 U.S. at 665-66.

In the instant case, the trial court in excluding the favored nations clause specifically held that it affected employers outside the bargaining unit and was for the benfit of the signatory employers to the TCA-United contract: "It is obviously there for the protection of the employer who signs up with the union on the premise that the union will not thereafter give one of its competitors a better break." (C26)

Given the fact here that the favored nations clause benefitted employer signatories to the TCA-United contract *vis-a-vis* employers outside the bargaining unit, the Second Circuit's opinion that the exclusion of this clause was irrelevant is in direct conflict with the Supreme Courts decision in *Pennington, supra.* See also *Ramsey v. United Mine Workers of America,* 401 U.S. 302, 313 (1971).

This Court again had occasion to consider a most favored nations clause in *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), and Justice Powell's analysis illustrates the important point that such a clause may be relevant in an antitrust case even where, as in *Connell,* there is no challenge to the clause itself. At issue was the agreement between the plaintiff general contractor and the defendant union, whereby the general contractor agreed not to deal with subcontractors who were not organized by the union. The union's contract with a group of organized subcontractors con-

tained a most favored nation clause. The court assessed the restraint created by the subcontracting agreement by observing how it interacted with the most favored nation clause to produce a restraint in a portion of the subcontracting market. *Id.* at 623-24.

Thus, there is considerable precedent for this Court to examine the indirect, interactive effects of a most favored nations clause. In ruling as they did, the courts below created a contrary rule. It is also important to note that this Court found no difficulty in the fact that the most favored nations clause in *Connell* was found to have an effect on the parties' behavior that could not be determined solely from the language used. *Id.* at 623 n. 1.

B. *By judicial determination of the facts, the courts below denied TTI its right to a trial by jury.*

The Circuit Court's holding as to the favored nations clause is contrary to decisions of this Court. (See discussion at pp. 16-18, *infra*). It is also inconsistent with the record in the District Court.

The Circuit Court's response to a central point of TTI's case was, in effect, that a judicial construction of the contract was determinative. It held that the favored nations clause was irrelevant because it was unambiguous and independent of the per diem clause. The only possible predicate for the Circuit Court's ruling is that the favored nations clause concerned only "wages" and "hours" and, by strict definition, "per diem" was not a "wage".

However, the District court, in excluding the favored nations clause from the jury, stated that the clause concerned "compensation and hours", and not merely "wages". Further, the District Court ruled that the per diem was a wage clause (174, 988) and, in its charge to the jury, the District Court twice told them "per diem affects the wages of scenic artists" (D4, D6). The District

Court's treatment of the per diem as a wage makes it obvious that its exclusion ruling was not based on semantics, as the Circuit Court held.[9]

The Circuit Court overlooked that the District Court stated that the basis of its ruling was a factual finding that the clause represented the "basic position" or unilateral action of the union. The District Court was of the opinion that, to use the words of the favored nations clause, in order "[t]o maintain equitable competitive standards within the industry" a union may lawfully agree with certain employers to equalize non-labor costs (e.g. rent) in an industry. This was error in accordance with numerous prior decisions of this Court. See Point II, infra.

Aside from the other legal infirmities of this position, it was without the power of the District Court to make this finding. The ruling was made before a word of testimony was heard and is not shielded by the "clearly erroneous" test embodied in Rule 52(a) of the Federal Rules of Civil Procedure, *United States v. General Motors Corp.*, 384 U.S. 127 at 141-2 Note 16 (1966). It was an improper invasion of the province of the jury in accordance with a rule consistently applied by all the circuits since it was stated more than a century ago by this Court:

> "Doubtless the general rule is that it is the province of the court to construe written instruments; but it is equally

---

9. Similarly, the Circuit Court's finding that the "favored nations" clause was unambiguous appears to be otherwise without foundation: the caption of the clause reads "No More Favorable Contracts With Others"; the arbitrator of the 1974 TCA/United dispute as to the meaning of this clause found its language atypical, and relied on trade practice to interpret the clause; and the District Court's pretrial decision denying summary judgment to United shows that it did not consider the clause to be unambiguous.

> well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury, . . ." *West v. Smith,* 101 U.S. 263 at 270 (1869).

In *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969), this Court's *per curiam,* opinion reversed a grant of summary judgment for the defendants in an antitrust case. The plaintiff alleged a conspiracy on the part of one Matthews and several cemeteries. The plaintiff offered evidence of certain rules promulgated by the cemeteries and a pamphlet distributed by Matthews. The district court read the rules as "reasonable," but this Court found:

> "The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment. The same is true of the inferences to be drawn from respondent Matthews' pamphlet."

394 U.S. at 702-03. The most favored nations clause in the 1973 contract is surely as relevant to the petitioner's conspiracy case as the pamphlet in *Norfolk Monument*; it evidences the conspiracy charged by TTI.

Further, even if the favored nations clause could be interpreted as a matter of law to be limited to wages in the strict sense of the word, which would mean that the trial court erroneously defined per diem to be wages, the exclusion of the favored nations clause from the jury would still be reversible error. The narrowest of interpretations that could be given to the favored nations clause is that United had obligated itself to TCA in regard to wage and hour terms that it could negotiate with TTI and any other employer. The exclusion of the fact that United was not

free to negotiate these basic terms of its collective bargaining agreement with TTI because of a prior agreement with TCA deprived the jury of material evidence of this expressed conspiracy between United and TCA. This Court has explained why such an exclusion is reversible error:

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing it as separate parts, but only by looking at it as a whole (citation); and in a case like this one before us the duty of the jury was to look at the whole picture and not merely at the individual figures in it' (citations)." *Continental Ore Co., et al v. Union Carbide & Carbon Corp.*, 370 US 690 at 699 (1962).

The favored nations issue was a crucial matter in this case. See *Pennington, supra; Connell, supra.* Denial of TTI's right to a jury determination as to this issue violated its right to a trial by jury.

> "We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' Dimick v. Schiedt, 293 U.S. 474, 486." *Beacon Theatres v. Westover,* 359 U.S. 500, 501 (1959).

C. *The decision of the Circuit Court offends the basic tenet of due process: reasonableness.*

A necessary predicate to the Second Circuit's ruling that the favored nations clause was independent of the per diem clause is that the per diem was not a wage. However, in this same decision, the court stated that there was no

prejudicial error in the charge to the jury. In the charge, for the purposes of justifying United's exemption from the antitrust laws, the jury was twice told that "per diem affects the wages of scenic artists."(D4-6)

The *sine qua non* of due process is reasonableness. It appears to be unreasonable, and grossly unfair to TTI, to define per diem as a wage in order to exempt United from liability, while at the same time stating that per diem is not a wage in order to exclude evidence showing United conspired with the New York City scenery shops.

II.

UNITED MAY NOT LAWFULLY SHELTER NEW YORK CITY EMPLOYERS FROM COMPETITION

United's jurisdiction extends from Maine to Florida. Nevertheless, United's prime concern was to allocate the scenery market to New York City. This area forms a small part of United's jurisdiction, but it is surrounded by a wall built by United, its designers, and favored scenic suppliers. Evidencing United's motive for maintaining this enclave was the statement made by one of its designers at the January 3rd, 1974 meeting of its Executive Board: "—we are going to have to come to grips with the fact that show business is no longer centered in New York City. Our jurisdiction may spring from here, but the business is not here." (P162). This statement followed the rejection for membership of an artist who lived near, and could have worked at, National Scenery in Virginia. (P162).

Proof of United's determination to shelter suppliers there from competition was contained in United's minutes which were excluded from the jury:

> "[United's business agent] said the shops in New York are moving away from the city in order to be able to bid low.

He said [TTI] underbid others for the Shirley McLaine Show by $20,000; it would be dangerous to give concessions to such outlying shops." (P141, Excluded).

A. *The affirmed rulings of the trial court erroneously led the jury to believe that United could legally use its labor contracts to equalize non-labor costs among competing employers.*

The trial court took the view that it was proper that the union contract serve to equalize the non-labor costs (e.g. rent) of employers in order to affect competition among the employers:

THE COURT: Well, of course, there is a counterweight to it, isn't there? It's cheaper to run your business in Newburgh than 59th Street and Eighth Avenue."

* * *

THE COURT: He can't have it all one way. What you are saying is, I am entitled to cheap rent and I am entitled to be able to compete, but my rent is cheaper, and if these fellows want to go down I can always outbid them because I only have to pay the rates they are paying." (557-58)

The trial court continually overruled TTI's objection to United's introduction of testimony as to the relative non-labor operating costs of doing business in New York City *vis-a-vis* that of doing business outside of New York City. In addition, the trial court refused to charge the jury that it was not to consider the relative operating costs of doing business in New York City, as opposed to that of doing business outside New York City, in determining the anti-competitive purpose of the *per diem* clause. (987).

The continual admission of this improper testimony, and the refusal of the trial court to attempt a curative charge, left the jury with the belief that it was a lawful objective of United to equalize non-labor costs among the scenery shops by means of the per diem. This was par-

ticularly prejudicial here because of the wording of the interrogatories that indicated a benefit to the union from the per diem would negate TTI's "conspiracy' " claim.

The courts below were mistaken. This Court has made it clear that a union, by means of its labor contracts, does not have the right to legally attempt to equalize costs which "were not derived from substandard wages and working conditions, but rather from more efficient operating methods." *Connell, supra,* 421 U.S. at 623, and that a union may not combine with a non-labor group to further the latter's competitive interests even when the union's motives were to get and hold jobs for its members. *Allen Bradley Co. v. Local 3 Int'l Brotherhood of Electrical Workers,* 325 U.S. 797 at 798 (1945). Similarly, the fact that the implementation of the "Protective Wage Clause" in *Pennington* resulted in labor peace did not afford the union exemption from the antitrust laws. 381 US at 660, and in *Federal Maritime Commission v. Pacific Maritime Ass'n*, 435 US 40 (1978), a union's attempt to eliminate a competitive disadvantage to certain union employers, *vis a vis* other employers, did not enjoy the labor exemptions. (435 US 40 at 62-63).

B. *The per diem clause was a direct market restraint which is prohibited by antitrust law and not justified by labor policy.*

Pennington concerned an agreement between a union and a multi-employer bargaining unit to impose a uniform wage standard on employers outside the unit. However, this case presents one of those "avowedly discriminatory schemes"[10] which Justice White described in a

10. The operative factor for the per diem is the location of the scenery shop outside of New York City; it is not the distance between the employees' residence and workplace. An employee working for a New York City shop could travel 100 miles to work and not get per diem, whereas an employee working for a shop outside of New York City would receive it if he travelled 10 miles to work.

hypothetical case presented as even more clearly unlawful than the actual scheme considered in *Pennington,* 381 U.S. at 668. Indeed, Justice White's description of such a scheme is an extension of his discussion of a union-employer agreement about the price of coal which he describes as a restraint "of the type characteristically deemed unreasonable under the Sherman Act." *Id.* at 663.

Before trial TTI unsuccessfully cross-moved for summary judgment against United because the per diem was an illegal direct restraint.[11] During the trial TTI argued that the per diem clause was not the proper subject of a collective bargaining agreement because it did not pertain to labor, hours, or working conditions, but was a clause that required payments from employers located outside of New York City and was unrelated to the distance or travel time of the employees (548). In furtherance of this position, TTI had submitted requests to the charge asking the jury to consider the anticompetitive effect of the per diem (170-72), and took exception to the charge. "There was an obvious restraint and it should be a waiver of the non-statutory exemption." (1029).

The courts below ignored the relevance of this aspect of the per diem clause, and that the jury charge only emphasized the ways in which the per diem clause was legal. (D4-5). Thus, the jury was led to believe that United's exemption could not be forfeited if the per diem was a direct restraint not required by labor policy. This conflicts with this Court's decisions in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 688-89 (1965), and *Connell, supra.* As this Court noted in *Connell:*

---

11. The District Court denied the motion stating: "As I have already noted, the court will not adopt a per se violation rule; (citation). However, the anti-competitive effect of the per diem is obvious."

"Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members." 421 U.S. at 622.

III.

THE DECISION OF THE COURT BELOW IN REGARD TO THE JURY INSTRUCTIONS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION AS TO LABOR EXEMPTION FROM THE ANTITRUST LAWS AND WAS OTHERWISE IMPROPER.

The charge to the jury was legally erroneous and made it logically impossible for the jury to find that United had forfeited its exemptions from the antitrust laws. This prejudice to TTI was compounded by the interrogatories which the court sent directly to the jury without first showing them to counsel. In the circumstances here, these interrogatories were a supplemental charge to the jury and crucial to its determination. Their ambiguity and misleading nature misdirected the jury's verdict for United.

A. *The charge to the jury was clearly erroneous.*

As to United's statutory and non-statutory exemptions, the Court instructed the jury that the statutory exemption could be forfeited only by a conspiracy with a non-labor group, and that the non-statutory exemption would not be forfeited by such a combination if per diem was intimately or intermittently related to wages (D5). Then the court twice told the jury per diem affects wages.

How could United have forfeited its exemptions under this charge? It was a complete "Catch 22" situation, or logically impossible for the jury to find that the exemptions were forfeited.

More important, the charge was in direct conflict with this Court's decision that the non-statutory exemption is forfeited when a union and non-labor group conspire:

> "[The statutory exemptions] do not exempt concerted action or agreements between unions and non-labor parties. . . . Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, e.g. Federation of Musicians v. Carroll 391 US 99 (1968), the non-statutory exemption offers no similar protection when a union and a non-labor party agree to restrain competition in a business market." *Connell, supra,* (1975) 421 US at 622-23.[12]

Clearly, the charge to the jury was prejudicial. The trial court's charge as to the labor exemptions erroneously presented the jury with insurmountable obstacles to any verdict for TTI.

B. *The interrogatories submitted to the jury, without review by Counsel, misdirected the jury's verdict for United.*

Approximately half an hour into its deliberations, the jury sent a note to the trial court asking for a "Copy of the main charge, excluding the introduction and conclusion." (Court Ex. 1, 1034). The Court did not repeat any of the charge to the jury, but directly sent them interrogatories. These interrogatories posed a new and misleading

12. With respect to the exception noted in *Connell* for the *Carroll* case, the basis for this exception does not exist here. The *Carroll* case concerned situations where the income of the employee members of the union were affected by their economic relationship with independent contractors. It is undisputed that there is no economic relationship between the artists and designers members of United. Neither the artists' income nor their jobs are dependent upon, or affected by, the designers.

issue—whether the per diem clause was "inserted" in the 1973 contract. The jury requested the 1970 and 1973 contracts (1036). The per diem clause was in both, and the jury answered each question with "inserted": "No."[13]

The third interrogatory also used the "inserted" terminology and added the requirement that the per diem be "for the purpose of benefiting the scenic designers and not for the benefit of the scenic artists." The latter is clear error. The per diem could both enrich the scenic artists and further the interests of the designers or scenic suppliers, and still be the result of a "conspiracy." ThisCourt has repeatedly held that the symbiotic nature of the relationship between the union and non-labor group affords no protection to the union. See *e.g. Pennington, supra,* 381 U.S. at 664-65; *Allen Bradley, supra,* 325 U.S. at 798.

In the circumstances here, the interrogatories were a supplemental charge to the jury and crucial to its determination. Their ambiguity and misleading nature misdirected the jury's verdict. *Rogers v. United States,* 422 U.S. 35, 38-41 (1975). "The venerable case of *Fillipon v. Albion,* 1919, 250 U.S. 76 [81-82] — compels reversal." *Dixie-Land Iron & Metal Company, Inc. v. Piedmont Iron & Metal Company,* 583 F.2d 717 (5th Cir. 1978).

---

13. The confusion created by the word "inserted" should have been apparent to the Court. In its June 27, 1980 decision denying United's motion to disqualify TTI's counsel, the Court stated: "I understand that the clauses under attack in this lawsuit have been standard with United for many years preceding 1970. There is no issue regarding their negotiation in 1970 or 1973."(C22).

IV

TTI PRESERVED ITS OBJECTIONS TO THE CHARGE

The Circuit Court, citing Rule 51 of the Federal Rules of Civil Procedure, held that TTI had not preserved its objections to the charge. It is respectfully submitted that TTI did preserve its objections to the charge, particularly in view of the lengthy arguments to the court, and written requests to the charge which were submitted to the court before TTI made its exceptions. (See page 9, *supra*.)

Before the charge was given, TTI requested that it be permitted to move in regard to the proposed jury instructions and was told by the court to do it after the charge was given. Subsequent to the charge, the court entertained only exceptions to the charge, and TTI made four exceptions to the charge which were denied by the court. (See page 10, *supra*.)

All four of TTI's exceptions were addressed to the court's charge as to the labor exemptions credited to United in the charge. The exceptions were distinctly stated. A verbose narrative of such would not have been appropriate, or served any purpose. The court was well acquainted with TTI's position in regard to each exception. Following the close of the evidence and hearing arguments on United's motion for a directed verdict the Court commented to TTI's counsel:

> "Now how I am charging the jury and if you start wandering away I am going to cut you down. That's why I am going to tell you to come at 4 o'clock and I will rule on your requests to the charge so you will know how this case is being presented to the jury because if you argue the other way you are going to lose that jury completely because I am going to tell you what I am going to tell them they have to look for." (983)

Clearly, the Court understood TTI's arguments. The Court's consideration and refusal of TTI's instructions further clarified this understanding. *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1370 (9th Cir. 1979). TTI did make appropriate exceptions to the charge. However, in the circumstances here, even if TTI made no exception to the charge its objections would have been preserved for appeal. *Cohen v. Franchard Corporation,* 478 F.2d 115, 122 (2d Cir. 1973), *cert. den.* 414 U.S. 857 (1973). The charge contained plain error in that it misstated fundamental principals governing TTI's right to recovery. *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979). "[A] refusal to reverse here would be inconsistent with substantial justice Rule 61 F.R. Civ. P." *Clayton v. Burston,* 493 F.2d 429, 432 (5th Cir. 1974).

V.

THE AFFIRMED DENIAL OF A DIRECTED VERDICT TO TTI ON THE DESIGNER ISSUE IS CONTRARY TO THE DECISIONS OF THIS COURT.

The jury's finding that set designers were independent contractors, in effect, was a determination that United was engineering a group boycott and price fixing by means of its collective bargaining agreements, and that United was not a labor organization entitled to exemptions from the antitrust laws.

A. *United engineered a group boycott and price fixing.*

Once the jury determined that the scenic designers were independent contractors, TTI was entitled to a directed verdict on a basis of *per se* violations, group boycott, and price fixing. As to the former, United's contract with TTI barred TTI from hiring United scenic

designers for any work other than television. By reason of the combination between these independent contractors and United's scenic artists, TTI found itself in a position functionally analogous to the general contractor in the *Connell* case—in order to hire United scenic artists, it had to agree *not* to hire United scenic designers. The one exception to this boycott was television work, where United fixed the prices at which these independent contractors could be hired.

TTI was entitled to judgment as to these per se violations. *Provision Salesmen & Distributors v. United States,* 393 US 480 (1969), *Los Angeles Meat & Provisions Drivers Union v. United States,* 371 U.S. 94 (1962), and *American Medical Assn v. United States,* 317 U.S. 519 (1943).

B. United was not entitled to the labor exemption from the anittrust laws.

United admits that the vast majority of its members are designers (239a). Throughout the trial the jury heard the testimony of set, costume and lighting designers, who work in theatre, films and television, as to the nature of their work and business relationships with producers who retain them. United did not dispute the testimony of a producer, and documentary evidence admitted that whenever a producer retains a United designer in one design category that he is obligated to hire United designers in all categories.[14] In fact, such practice is dictated in United's

---

14. Examples of the designers' use of artists to further the designers' interests included in United Minutes (PX 31, excluded): a designer's having submitted sketches to an artist without a union stamp, and the scenic artist's refusal to paint from the sketches (P126); United's stopped work at scenery shop to put on a designer (P120); and "Old policy at World's Fair to stop work on painting to force employment of designers" and "Recent picketing at Laugley-Sann to get designers on". (P125).

Constitution and Bylaws. (See note 7 at page 9, *supra.*)

As the jury, in effect, decided, and the NLRB held, all United's designers were independent contractors. Their conspiracy was established *inter alia* by United's Constitution and Bylaws, and labor contracts. *Associated Press v. United States,* 326 U.S. 1 (1945); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). Their preditory intent was documented by the 1963 consent decree between United and the Justice Department. See Note 3, page 4 *supra. United States v. United Scenic Artists, Local 829,* 27 F.R.D. 499 (S.D.N.Y. 1961).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

WILLIAM J. CROSSIN
Counsel for Petitioner
65 Prospect Avenue
Larchmont, New York 10538
(914) 834-5441

March 24, 1982.

APPENDICES

APPENDIX "A"
SECOND CIRCUIT DECISIONS
AFFIRMANCE OF JUDGMENT
DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of September, One Thousand Nine Hundred and Eighty-One.

ORDER 80-9137 Filed 10/16/81

PRESENT:

HON. J. EDWARD LUMBARD, *Circuit Judge*
HON. WALTER R. MANSFIELD, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*

THEATRE TECHNIQUES, INC.,

Plaintiff-Appellant,

v.

UNITED SCENIC ARTISTS LOCAL 829 OF THE BROTHERHOOD OF PAINTERS, ALLIED TRADES, AFL-CIO, BEN EDWARDS, STAN CAPPIELLO, PEGGY CLARK, ABE KANTER, ANDREW CLORIS,

Defendants-Appellants.

Appeal from a judgment of the United States District Court for the Southern District of New York (Metzner, J.) entered November 26, 1980, after a jury trial confined to the issue of liability. Appellant, the plaintiff below, instituted this action alleging violations of the Sherman Act, 15 U.S.C. §§1, 2. Appellant argued to the jury that the appellee union had combined or conspired with certain employers, scenic design shops located in New York City, or with scenic designers, a non-labor group within the union, to unlawfully restrain trade and restrict competition by imposing higher labor costs on scenic design shops located outside the New York City area by requiring payment of a per diem in addition to regular wages for work performed at non-New York City shops. Appellant also alleged in its complaint that the union monopolized the theatrical scenery industry. The court dismissed the monopoly claims, but the section 1 claim was submitted to the jury which returned a verdict in favor of the appellees. We affirm the judgment.

Appellant contended the district court erred in its rulings concerning the "most favored nation" clause which was also part of the contract. Appellant argued that the clauses were linked. The contract, however, was unambiguous. The most favored nation clause was on its face independent of the per diem clause. Evidence concerning the most favored clause was, as a result, irrelevant to the resolution of appellant's claim that the per diem clause was imposed on scenic design shops located outside New York City in furtherance of a conspiracy to restrain trade.

Appellant failed to preserve its objections to the charge given to the jury. Fed. R. Civ. P. 51. In any event we find no prejudicial error in the charge as given. Though the court should have given counsel copies of the interrogatories which were submitted to the jury, the interrogatories were proper in form and the appellant was not

prejudiced. *Cramer v. Hoffman,* 390 F.2d 19 (2d Cir. 1968).

The district court correctly dismissed appellant's monopoly claims under section 2 of the Sherman Act, 15 U.S.C. §2. There was nothing in the complaint but a bare-bones statement that the union had monopolized the industry. There was nothing in the complaint suggesting that a monopoly existed in a relevant market, that appellant had been damaged by such monopolization, or that appellant was suing for such damages. Further there was no evidence to support any claim of a section 2 violation.

Appellant's other contentions relating to certain evidentiary rulings of the district court are without merit.

The judgment is affirmed.

s/Hon. J. Edward Lumbard
Hon. J. Edward Lumbard

s/Hon. Walter R. Mansfield
Hon. Walter R. Mansfield

s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of January, one thousand nine hundred and eighty-two.

THEATRE TECHNIQUES, INC.,
Plaintiff-Appellant,

-v-

UNITED SCENIC ARTISTS LOCAL 829 ET AL.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Theatre Techniques, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/A. Daniel Fusaro
A. Daniel Fusaro, Clerk

by Francis X. Guidhart, Chief Deputy Clerk

APPENDIX "B"
JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.

Plaintiff,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 of the BROTHERHOOD OF PAINTERS and ALLIED TRADES, AFL-CIO; BEN EDWARDS; STAN CAPPIELLO; PEGGY CLARK; ABE KANTER and ANDREW CLORIS

Defendants.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Charles M. Metzner, United States District Judge, and a jury on November 10, 1980, and during the trial the complaint having been withdrawn as to defendants Stan Cappiello and Peggy Clark, and the trial having continued as to the remaining defendants, and at the conclusion of the evidence the jury having answered the attached Special Questions finding in favor of defendants Local 829, Edwards, Kanter and Cloris, it is,

ORDERED, ADJUDGED AND DECREED: that the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
November 26, 1980

SPECIAL VERDICT FORM
(INTERROGATORIES TO JURY)

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the Tenth day of November, in the year of our Lord, One Thousand Nine Hundred and Eighty.

PRESENT:
HON. CHARLES M. METZNER
United States District Judge

THEATRE TECHNIQUES, INC.

-v-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, BEN EDWARDS, STAN CAPPIELLO, PEGGY CLARK, ABE KANTER and ANDREW CLORIS

Now comes the Plaintiff by Crossin & Crossin, 65 Prospect Avenue, Larchmont, New York 10538, By William J. Crossin (914) 682-6007 and moves the trial of this cause. Likewise comes the Defendant by Cohen, Weiss & Simon, 605 Third Avenue, New York, N.Y. 10016 by Michael E. Abram & Keith Secular.

Thereupon a Jury in duly empaneled and sworn, and the cause proceeds to Trial Nov. 10, 1980. Nov. 12, 1980 Trial continued. Nov. 13, 1980, Trial continued. Nov. 17,

1980 Trial continued, Complaint withdrawn as to defendants Clark & Cappiello. Nov. 18, 1980 Trial continued (court meets and trial is adjourned to ll/19/80). Nov. 19, 1980 Trial continued (Court meets and adjourns to 11/20/80). November 20, 1980 Trial continued. Nov. 21, 1980 Trial continued. Nov. 24, 1980 Trial continued and concluded.

5:108 Jury returns verdict in favor of defendants. (See special verdict form).

I am asking you to answer the following questions:

1. Did the plaintifif prove that the scenic designers are independent contractors? Yes.

2. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract as the result of a conspiracy between Local 829 and the New York City shops? No.

3. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract for the purpose of benefiting the scenic designers and not for the benefit of the scenic artists? No.

4. Did the plaintiff prove that the per diem clause was inserted in the 1973 contract as the result of a conspiracy between the scenic designers and the New York City shops? No.

5. For whom do you find on the entire case?

Plaintiff or Local 829? Local 829

Plaintiff or Edwards? Edwards.

Plaintiff or Kanter? Kanter

Plaintiff or Clores? Clores

Opinion and Order, J. Metzner, dated October 31, 1979, on Defendants' Summary Judgment Motion and Plaintiff's Cross-motion for Summary Judgment, 1980-81 CCH Trade Cases Par. 63,031

THEATRE TECHNIQUES, INC.,
Plaintiff,
v.
UNITED SCENIC ARTISTS LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO et al., Defendants.

U.S. District Court, Southern District of New York, No. 76 Civ. 5417 (CMM). Filed November 1, 1979.

METZNER, D.J.: Defendants move for an order pursuant to Fed. R. Civ. P. 56 granting summary judgment in their favor, with costs, disbursements and reasonable attorneys' fees, and in the alternative, for an order pursuant to Fed. R. Civ. P. 14 granting leave to join Peter Feller as a third party defendant. Plaintiff cross moves for summary judgment.

Plaintiff employs members of United Scenic Artists, Local 829 of the Brotherhood of Painters and Allied Trades, AFL-CIO (Local 829), in its business of producing theatrical scenery in Newburgh, New York. Plaintiff alleges that defendants, Local 829 and its officers, conspired with various New York City employers which hired members of Local 829 to set wages paid by non-New York City employers at a higher rate than those paid in the city. It also alleges that the defendants conspired with the three nationwide television networks to keep wages at non-network studios higher than those paid by the network

studios. These conspiracies allegedly restrain plaintiff in competing with the New York City shops and the networks in violation of the Sherman Act, 15 U.S.C. §§1 and 2.

[Union Contracts]

Two so-called standard contracts are involved here. One is the independent scenery suppliers' union contract and the other is the standard television network studio union contract. The latter covers the employees working in the in-house scenic shops maintained by the stations. Theatrical scenery used in stage shows, television programs and sometimes in films is designed by scenic designers, many of whom are members of Local 829. The designs are then constructed by carpenters and thereafter the painting and sculpturing work is done by scenic artists who are also members of Local 829. Although most of the work is done in New York City, Local 829's jurisdiction covers the entire eastern part of the country.

Prior to the 1960s, all of the independent shops employing members of Local 829 were within ten miles of New York City. Collective bargaining agreements with the scenery shops other than the television network studios were negotitaed in joint, industry-wide bargaining between employers and Local 829. Included in these agreements were two clauses to which the plaintiff objects in his conspiracy claim involving the New York City independent shops.

[Favored Nations Clause]

One clause, known as a "most favored nations" clause, requires that "no agreement providing for minimum wages lower than, or maximum hours higher than, those provided herein, will be made by Local 829

with any independent contractors furnishing scenery to theaters, networks, and film studios."

[Per Diem]

The second clause requires that shops outside a ten-mile radius of Columbus Circle must pay a $30 per diem and travel cost to any employee who lives more than ten miles or one-half hour from the shop.

Plaintiff also complains that the television network contract contains wage rates more favorable to the employer than does the scenery shop contract. In addition, if a scenery shop is constructing scenery both for television and for another production, separate crews must be employed for each construction and the television crew paid at the higher scenery shop rate. Finally, scenic designers may be hired by the independents for no less than 13 weeks' service, while the networks may hire on a daily basis.

Plaintiff Theatre Techniques was started in 1975 by Peter Feller, plaintiff's president and sole stockholder. Feller had previously owned Feller Scenery Studios, Inc. (FSSI) which was located in the Bronx and was voluntarily placed in bankruptcy.

Plaintiff claims it attempted to negotiate a contract with Local 829. It sought a wage scale similar to that of the network agreements, and elimination of the per diem clause. Plaintiff contends that Local 829 refused to negotiate a contract on terms other than those given to the other shops because of the "most favored nations" clause in their agreement with the scenery shops. Defendants claim that they were willing to negotiate but that plaintiff failed to submit drafts of what is proposed. In the end, they claim that in order to bring the matter to a head, they had to insist on the standard contract.

[Imposition of Wage Scales]

Defendants seek summary judgment on several grounds. First, they rely on language in *United Mine Workers of America v. Pennington* [1965 Trade Cases Par. 71,462], 381 U.S. 657, 665 (1965), to the effect that a union may adopt a uniform wage policy in its negotiations with employees without violating the antitrust laws. There is no quarrel with that statement. The dispute here rests on plaintiff's contention, relying on other language in Pennington, that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* The clause does not create a per se violation, but it does create a factual issue as to the nature of the agreement. Under the circumstances, neither side is entitled to summary judgment on this issue.

In *South-East Coal Company v. Consolidation Coal Co.* [1970 Trade Cases Par. 73,391], 434 F.2d 767 (6th Cir. 1970), a clause similar to the clause in issue was construed to be enforceable only against members of the employers' group. If the clause here does seek to impose conditions on noncontracting parties, that will be sufficient to remove the exemption to the antitrust laws; See *Connell Co. v. Plumbers & Steamfitters* [1975-1 Trade Cases Par. 60,341], 421 U.S. 616 (1975).

Similarly, neither side is entitled to summary judgment on the per diem and travel time clause affecting out-of-town shops.

[Successor Employer]

Defendants assert further grounds to support their motion for summary judgment on the claim of conspiracy with the New York City shops. Defendants argue that plaintiff is the successor employer to FSSI, which was sub-

ject to a collective bargaining agreement with Local 829.

Plaintiff is not the legal successor to FSSI. FSSI was voluntarily adjudicated bankrupt in June of 1975. Defendants have cited no cases in which a new company formed by the same person who controlled a bankrupt firm could be deemed a successor firm to the bankrupt one. In *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F. 2d 698 (2d Cir. 1975), the court held that in bankruptcy, a new entity is created, and unless it assumes the old agreement or negotiates a new one, it is not a party to any labor agreement. See also *Forde v. Kee Lox Manufacturing Company, Inc.*, 584 F. 2d 4 (2d Cir. 1978). Under Section 70(b) of the Bankruptcy Act, 11 U.S.C. §110(b), executory contracts of one adjudicated a bankrupt are deemed rejected if not expressly assumed.

[Anticompetitive Effects]

Finally defendants urge that plaintiff has shown no anti-competitive effect and has thus failed to show an unreasonable restraint of trade. As I have already noted, the court will not adopt a per se violation rule in this situation; see *Commerce Tankers Corporation v. National Maritime Union of America* [1977-1 Trade Cases Par. 61,387], 553 F.2d 793, 802 (2d Cir.), cert. denied, 434 U.S. 923 (1977). However, the anticompetitive effect of the increased cost of labor to firms outside of New York City is obvious. The fact that plaintiff has survived may merely prove its tenacity. It does not show the lack of any restraint.

[Television Contracts]

Plaintiff's claims as to a conspiracy with the television networks must fail. There is no clause in the network agreements which requires Local 829 to impose the higher

wage scales on the independents. Plaintiff offers only the inference from the differential wage scale to support its claim of collusion. However, defendants have offered solid reasons why a different contract emerged from negotiations with those employers than from negotiations with the scenery shops. The networks offer full-time employment and fringe benefits, such as sick leave, severance pay, and paid vacations. Many of the employees in the independent shops are only part-time. There are no affidavits from other scenery shops, and after two and a half years of discovery plaintiff has failed to produce any evidence to sustain a holding that a triable issue exists on this claim. *Securities and Exchange Commission v. Research Automation Corp.*, 585 F.2d 31 (2d Cir. 1978).

Defendants' motion to join Peter Feller must also be denied. Defendants' answer was filed March 25, 1977. This court's Local Rule 16 states that motions to file a third party complaint more than six months after service of the answer may be granted "in exceptional cases upon a showing of special circumstances and of the necessity for such relief in the interest of justice . . . " Factors to be considered are:

> (1) Whether the third party plaintiff affected any deliberate delay or was derelict in filing the claim, (2) whether prejudice will result to the third party defendant, and (3) whether the trial of the principal action will be delayed or unduly complicated. *Connell v. Bernstein-Macauley, Inc.*, 67 F.R.D. 111, 116 (S.D.N.Y. 1975).

Defendants in their answer claimed that plaintiff, in violation of Rule 13, Fed. R. Civ. P., had failed to join the New York City scenery suppliers with whom they allegedly conspired. It is too late to bring Feller in for that purpose more than two years later in 1979. Furthermore, it is not necessary under the issues posed by this lawsuit.

Defendants' motion for summary judgment is granted as to any claims based on a conspiracy between Local 829 and the television networks. The motion is denied as to the conspiracy between Local 829 and the New York City shops. Plaintiff's motion for summary judgment is denied. Defendants' motion for leave to serve a third party complaint is denied.

So ordered.

Opinion and Order, J. Metzner, dated January 9 1980, as to the Relevancy of the Independent Contractor Status of the Designers in this Litigation, 438 F. Supp. 104 (SDNY 1980)

THEATRE TECHNIQUES, INC.,
Plaintiff,
v.
UNITED SCENIC ARTISTS LOCAL 829
OF THE BROTHERHOOD OF PAINTERS
AND ALLIED TRADES, AFL-CIO
et al., Defendants.

No. 76 Civ. 5417 (CMM).

United States District Court,
S.D. New York.
Jan. 9, 1980

483 F. Supp. 104

METZNER, District Judge:

This is an application by the defendants for clarification of the opinion and order of this court dated October 31, 1979, granting partial summary judgment for defendants and denying summary judgment to plaintiff. That opinion did not specifically address the issue of whether the designer members of the defendant United Scenic Artists, Local 829 of the Brotherhood of Painters and Allied Trades, AFL-CIO (the Local) are independent contractors.

Based on the briefs and affidavits submitted on the prior motions for summary judgment and on this application, I find that the defendants are not entitled to a finding

that the status of the designers is irrelevant to the determination of the issues in this litigation.

The membership of the Local consists of both designers and scenic artists. Plaintiff claims that the designer members are independent contractors who control the Local by their number and consequent strong representation in its governing offices. It further claims that these designers conspired with union representatives and the New York City scenic shops to limit the scenery construction business to New York City in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. It is alleged that the designers, by virtue of their control, were able to negotiate clauses favorable to their own business ends in the independent shop contracts concerned solely with the employment of the scenic artists. Plaintiff points specifically to the "most favored nations" and "per diem" clauses in those contracts as provisions which allocate the scenery construction market advantageously to the needs of the designers.

In short, plaintiff portrays the Local as primarily a group of independent businessmen masquerading as a union and using the employee status of its few scenic artist members to achieve the cloak of antitrust immunity.

Defendants first attack plaintiff's position by asserting that it failed to allege the conspiracy theory in the complaint and in its answers to interrogatories. This attack is unfounded. In its answers to defendants' first set of interrogatories plaintiff listed "designer members of Local 829" as participants in the conspiracies alleged in paragraphs 6, 7, 9, 11 and 12 of the complaint. See answers to interrogatories Nos. 17, 28, 19, 21, and 22. The allegations in the complaint adequately set forth the designer conspiracy theory.

Turning now to the question as to whether the status of the designer members of Local 829 is immaterial to the question of whether Local 829 is subject to the court's

jurisdiction in light of the labor exemption to the antitrust laws. 15 U.S.C. §17; 29 U.S.C. §§52, 104, 113. Those provisions exclude from the purview of the antitrust laws "labor organizations . . . lawfully carrying out the legitimate objects thereof" and "labor groups" involved in "labor disputes."

The crux of defendants' position is their contention that "it is the nature of the bargaining unit that determines the applicability of the labor exemption." They claim that since the contracts in question concerned themselves with scenic artists who admittedly are employees, the exemption applies as a matter of course. There is no need in their view to examine the makeup of the Local which acted as the bargaining agent.

Defendants cite no authority in point to support their position. They rely on cases holding that for the purpose of determining the applicability of Section 8(b) (unfair labor practices), a union cannot assert that the mere presence of some non-"employee" members takes the union outside the purview of the NLRA. *International Organization of Masters, Mates and Pilots v. NLRB,* 122 U.S. App. D.C. 74, 351 F.2d 771 (D.C. Cir. 1965); *National Marine Engineers Beneficial Ass'n v. NLRB,* 274 F.2d 167 (2d Cir. 1960); *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.,* 370 U.S. 173, 82 S.Ct. 1237, 8 L.Ed. 2d 418 (1962).

In those cases the defendant unions attacked NLRB jurisdiction on the ground that some of their members were "supervisors" rather than "employees" and that therefore they did not qualify as "labor organizations" subject to the proscriptions of Section 8(b) of the NLRA. Judge Friendly in *National Marine Engineers Beneficial Ass'n v. NLRB, supra,* refused to read the NLRA "so as to permit a union in which 'employees participate' to engage in acts branded as unfair labor practices by §8(b) simply because the workers *on whose behalf the union was*

acting are all supervisors." 274 F.2d at 173 (emphasis added).

Judge Friendly's careful distinction between his interpretation of the term "labor organization" in his unfair labor practice case, and previous interpretations of the term in cases involving Section 164 and Section 185 of 29 U.S.C. indicates that analysis of the term must focus on the purpose underlying the particular statutory provision in which it appears. *National Marine Engineers Beneficial Ass'n v. NLRB,* 274 F.2d at 173.

[1] We thus turn to the purpose of the antitrust laws and the labor exemption to determine whether a group of independent businessmen should be allowed to escape the sanctions of those laws due to the mere presence of some "employee"-members within the union. *See, Los Angeles Meat & Provisions Drivers Union v. United States,* 371 U.S. 94, 101, 102, 83 S.Ct. 162, 9 L.Ed.2d 150 (1962); *Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797, 808-11, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). The application of the labor exemption has not depended on the presence or absence of some "employees" within the union. Thus, in *United States v. Fish Smokers Trade Council, Inc.,* 183 F.Supp. 227 (S.D.N.Y. 1960), an antitrust violation was found even where independent contractors and "employees" were performing similar functions within the same union. In *Federation of Musicians v. Carroll,* 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed. 2d 460 (1968), the presence of some "employees" within the union was not considered as a factor in granting the labor exemption to a group of independent contractors.

If, as alleged, the scenic artist employees are only pawns in the endeavors of independent contractors to restrain competition and allocate markets, the immunity question cannot be determined solely on the basis that the Local's membership includes employees, or that the contracts were negotiated on behalf of such employees. In

such case Local 829 would have departed from the "legitimate objects" of labor and labor disputes. *United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. at 234; *United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd sub. nom. Provision Salesmen & Distributors Union, Local 627*, 393 U.S. 480, 89 s.Ct. 708, 21 L.Ed. 2d 688 (1969). "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676, 689, 85 S.Ct. 1596, 1601, 14 L.Ed. 2d 640 (1965).

[2] The status of the designer members is also relevant to the plaintiff's claim that Local 829 as presently constituted is itself an unlawful combination apart from having engaged in a conspiracy with another party. Defendants attack that claim on the ground that a union cannot conspire with itself. Their use of the word conspire is unfortunate. The cases speak of a combination to restrain trade. In *Los Angeles Meat & Provision Drivers Union v. United States, supra,* a combination violative of the Sherman Act was found to exist within a union which had been joined by four independent contractors seeking to fix prices and allocate markets for their own benefit. The Supreme Court noted that nothing in the labor exemption provisions "insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws." 371 U.S. at 100, 83 S.Ct. at 165. Thus, if the designer members of Local 829 are independent contractors using the union to achieve unlawful ends, the Local would lose any exemption it might have had in the first instance by reason of its representation of the scenic artists. *See Allen Bradley Co. v. Local Union No. 3, supra.*

The parties shall include in their pretrial order the issue of whether the designer-members of Local 829 constitute independent contractors, and shall address that issue at trial in accordance with the principles discussed herein.

So ordered.

Opinion and order, J. Metzner, dated June 27, 1980, on plaintiff's motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Rule 403 of the Federal Rules of Evidence for judgment as to certain of defendants' affirmative defenses and excluding prejudicial evidence at trial.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, BEN EDWARDS, STAN CAPPIELLO, PEGGY CLARK, ABE KANTER AND ANDREW CLORIS,

Defendants.

METZNER, D.J.:

Plaintiff, Theatre Techniques, Inc. (TTI) brings this motion for an order granting judgment in favor of plaintiff as to defendants' second, third, fourth, fifth, sixth and eighth affirmative defenses pursuant to Rule 12(c), Fed. R. Civ. P. It also seeks an order pursuant to Rule 403 of the Federal Rules of Evidence to exclude evidence at trial upon grounds that its probative value is substantially

outweighed by undue prejudice to plaintiff, and would confuse and mislead the jury.

Defendants have replied to the issues in plaintiff's papers, and have requested reconsideration of the court's decision of October 31, 1979, which denied defendants summary judgment.

This court has already outlined the background of the dispute in its opinion dated October 31, 1979, and its opinion reported in 483 F. Supp. 104.

Defendants' second affirmative defense (Para. 23 of Answer) states that this court is without jurisdiction because, if anything this complaint constitutes unfair labor practices and falls under the "exclusive primary jurisdiction" of the National Labor Relations Board (NLRB). A triable issue has already been found to exist under this affirmative defense as set forth in the opinion dated October 31, 1979. The motion as to this defense is denied.

Second, defendants' eighth affirmative defense claims that this court has not acquired personal jurisdiction over defendants Edwards, Cappiello, Clark and Cloris. Plaintiff claims it has an affidavit by a process server (permitted by order of this court dated May 12, 1978) that all individuals, except one Mr. Edwards, were served personally. There is no dispute as to service on Edwards. However, since plaintiff has failed to produce the affidavit of service, the motion is granted only as to defendant Edwards, otherwise denied.

Defendants' third affirmative defense states that there is no claim upon which relief can be granted. This defense is stricken in view of this court's opinion dated October 31, 1979.

The fourth affirmative defense alleges that plaintiff did not join all the parties necessary to resolve the issue. Plaintiff contends that an antitrust plaintiff need not sue all co-conspirators, and relies on this court's opinion of

October 31, 1979, when the court held that joinder of Feller and the NYC shops was not necessary for this lawsuit. This branch of the motion is denied.

Defendants' fifth affirmative defense states that the various injuries set forth in the complaint do not involve interests commerce within the meaning of 15 U.S.C. §§1 and 2. Plaintiff argues that the court should take judicial notice that defendants' activities are within interstate commerce. I agree with plaintiff that television exhibition is not limited by state boundaries. Theatrical productions in New York City go on tour both before and after opening in New York.

Finally, the sixth affirmative defense alleges that the "per diem" clause is exempt from the Sherman Antitrust Act because such a clause is intimately related to union members' wages. For the reasons stated above in relation to the second affirmative defense, the motion addressed to the sixth affirmative defense is denied.

The second part of plaintiff's motion deals with certain evidence which plaintiff requests to be eliminated from the trial pursuant to Rule 403. Plaintiff argues that antitrust cases are difficult enough for jurors, and, therefore, any extra issues and evidence may unnecessarily add to the confusion.

First, plaintiff wants no mention of the treble damages and attorney fee issues. Plaintiff argues such revelation would defeat the Congressional purpose, namely, to punish violators of the antitrust laws. Plaintiff cites an unreported opinion by Judge Tenney, *Carlyle Michelman v. Clark-Schwebel Fiber Glass corp.*, 66 Civ. 4230 (S.D.N.Y. 1974), which clearly expressed plaintiff's concern about the juror's knowledge of treble damages. In *Bordinaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 203 F.2d 676 (2d Cir. 1953), the court held that mention by defendant's counsel in the opening and closing statements to a jury that "he [plaintiff] wants what he can

claim as damages multiplied by three, unearned money," was not reversible error under the circumstances.

I agree with Judge Tenney that no mention should be made of the power in the court to treble any damages that may be awarded to the plaintiff, and to award counsel fees in such event. These matters are of no concern to the jury and should not intrude into their deliberations. *Semke v. Enid Automobile Dealers Association,* 456 F.2d 1361, 1370 (10th Cir. 1972).

Secondly, plaintiff requests exclusion of evidence concerning the Feller Scenery Studios, Inc. (FSSI) bankruptcy, the "representation" of scenery contractors by Mr. Crossin, TTI's attorney, in 1970, and his participation in the 1973 negotiations which resulted in the contract at issue here. Any evidence regarding FSSI's bankruptcy in 1975 is to be excluded. It has no relevance to the issues in this case. Furthermore, the bankruptcy is not admissible on Feller's credibility. The question as to excluding evidence of Mr. Crossin's alleged participation in past negotiations will be discussed in the opinion deciding defendants' separate motion on this issue.

Thirdly, plaintiff lists four remaining issues which defendants contend remain open issues for trial. This court in its October 31, 1979 opinion stated:

> "If the clause here does seek to impose conditions on noncontracting parties, that will be sufficient to remove the exemption to the antitrust laws."

The issue to be decided is whether the clause, because of its terms, violates the antitrust laws. The mere fact that the document is denominated a collective bargaining agreement is of no moment.

The second issue plaintiff brings to the court's attention is that defendants contend that TTI has not sustained any damages because plaintiff's expenses for labor are not

recoverable as damages for antitrust injuries. This contention is premature, in any event. As to the issue of damages, the Second Circuit held in *Baxter v. Coca-Cola,* 431 F.2d 183, 187 (1970):

> "There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage. [Citations omitted.]"

Once plaintiff establishes the violation, then it must show the causal connection between the violation and the per diem expenses imposed on TTI. The jury will decide if the violation was the "material cause" of the damages under appropriate instructions from the court.

The third issue plaintiff brings to the court's attention is that defendants contend:

> "The action must be dismissed if plaintiff does not demonstrate (a) the so-called New York City shops (Nolans, Variety, Lincoln, Messmore & Damam, and Hart) consciously joined with Local 829 in a concerted plan or conspiracy to require shops located outside New York City to pay travel expenses and per diem benefits to scenic artists and that (b) in carrying forward this scheme both the shops and the union had the specific concerted purpose of preventing shops located outside New York City from competing in a properly defined interstate product market. Plaintiff carries the burden of proof as to these issues.
>
> The action must be dismissed if plaintiff does not demonstrate that the so-called New York City shops joined with defendants in a direct conscious attempt to create a monopoly in a properly defined interstate product market. Plaintiff carries the burden of proof as to these issues." (United's P.T.O. p. 14, Nos. 13, 14)

Plaintiff claims such intent to injure is not needed. I disagree with plaintiff at this stage of the proceedings. I refer plaintiff to the subsequent proceedings in **Lewis v. Pennington,** 400 F.2d 806 (6th Cir. 1968), *cert. denied,* 393 U.S. 983 (1968), *rehearing denied,* 393 U.S. 1045 (1969). There the Sixth Circuit Court of Appeals clarified the necessary intent needed for a violation of the Sherman Act:

> "We thus understand *Pennington* to teach that:
> 1) a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;
> 2) 'predatory intent' (as used by Mr. Justice White (381 U.S. at 668, 85 S.Ct. 1585) and by Judge Taylor) is merely shorthand, employed to describe this anti-competitive conspiracy; and
> 3) such an anti-competitive conspiracy must be established by 'clear proof.' " *Id.* at 814.

See also, Smitty Baker Coal Company, Inc. v. United Mine Workers of America, 104 L.R.R.M. 2029 (4th Cir. 1980).

The fourth and final issue which plaintiff desires to be stricken is defendants' contention that plaintiff "may not recover damages herein by virtue of Peter Feller's active participation and involvement in matters complained of." At this stage of the proceedings it appears to me that such evidence is admissible. I will await the trial to make a definitive ruling.

The motion is disposed of as indicated above.

So ordered.

Dated: New York, N.Y.
June 27, 1980

s/Charles M. Metzner
U.S.D.J.

APPENDIX "C"
Opinion And Order, J. Metzner, Dated June 27, 1980, on Defendants' Motion to Disqualify Plaintiff's Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

-against-

UNITED SCENIE ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, et al.,

Defendants.

METZNER, D.J.:

Defendants bring this motion to disqualify plaintiff's counsel, William J. Crossin.

This is an antitrust case in which plaintiff, Theatre Techniques, Inc. (TTI) contends that the "industrywide" contract between United Scenic Artists, Local 829 (United), a defendant herein, and the New York City employers, sometimes referred to as "co-conspirators," violates the Sherman Act. Plaintiff is an out-of-town employer of scenic artists, and, as a result of his location, must pay "per diem" expenses incurred by union workers he hires under an industrywide union contract. Defendants claim they are barred from renegotiating another

contract with plaintiff because of a most favored nations clause in the industrywide contract.

These two clauses are the basis of plaintiff's claims in this litigation.

Defendants assert that Crossin acted as attorney for the employers' group in the 1970 negotiations with United and was very instrumental in formulating the contract which is at issue in this case.

In 1973 the employers formed an association called the Theatrical Contractors Association (TCA) to negotiate with United as a single group. TCA engaged David Wach as their counsel, but defendants claim Crossin still played an active role.

In 1974 TCA and United became involved in a labor dispute concerning the most favored nations clause. United had negotiated a different contract with three television networks. During the arbitration hearings, defendants maintain that Crossin assisted TCA's counsel, Mr. Wach.

Defendants argue that Crossin should be disqualified because he is likely to be a witness in this case. Defendants cite cases which say the test for disqualification is whether the attorney "ought" to testify, not whether he will testify. It is their claim that because of his role in the negotiations, his knowledge is such that he ought to testify. *Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., Inc.*, 423 F. Supp. 486, 488 (S.D.N.Y. 1976).

Defendants' next argument is that Crossin's representation violates Canons 4 and 9 of the Code of Professional Responsibility because plaintiff's attorney has essentially switched sides. Defendants argue that Crossin had a "substantial relationship" with the NYC employers in the early 1970's allowing plaintiff's attorney access to confidential conversations during negotiations with the alleged co-conspirators.

Crossin has not switched sides, and the allegation of "substantial relationship" is not substantiated. He merely represented Feller Scenery Studios, Inc. (FSSI). FSSI was owned by Feller and subsequently went bankrupt. Feller now owns the plaintiff. In 1970 each shop signed its own contract with United.

I understand that the clauses under attack in this lawsuit have been standard with United for many years preceding 1970. There is no issue regarding their negotiation in 1970 or 1973. They existed long before FSSI was in business.

Neither party to this lawsuit has listed Crossin as a potential witness.

Finally, this case is ready for trial and is over three and one-half years old. It is too late to bring this charge since the basis for all of the defendants' allegations were fully known at the time of the institution of the lawsuit. Certainly, disqualification now would create a financial hardship on the plaintiff.

Motion denied.

So ordered.

Dated: New York, N.Y.
June 27, 1980

s/Charles M. Metzner
U.S.D.J.

Amendment by J. Metzner, Dated August 4, 1980, of Decision Denying Defendants' Motion to Disqualify Plaintiff's Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

-against-

UNITED SCENIC ARTISTS, LOCAL 82, OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL—CIO, et al.,

Defendants.

METZNER, D.J.:

The opinion of this court heretofore filed on June 27, 1980, denying defendants' motion to disqualify plaintiff's counsel, is amended by changing the last sentence on page 1 to read as follows:

> Plaintiff claims it is barred from renegotiating another contract with defendants because of a most favored nations clause in the industrywide contract."

So ordered.

Dated: New York, N.Y.
August 4, 1980

Charles M. Metzner
U.S.D.J.

Amendment by J. Metzner, Dated September 15, 1980 of Decision on Plaintiff's Motion for Judgment as to Certain of Defendants' Affirmative Defenses

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, et al.,

Defendants.

METZNER, D.J.:

The opinion of this court heretofore filed on June 27, 1980, with regard to plaintiff's motion for an order granting judgment as to certain of defendants' affirmative defenses, is amended by changing the last sentence in the first full paragraph on page 3 to read as follows:

"This branch of the motion is granted."

So ordered.

Dated: New York, N.Y.
September 15, 1980

s/Charles M. Metzner
U.S.D.J.

Opinion and Order, J. Metzner, Dated November 7, 1980, as to Trial Issues

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, et al.,

Defendants.

METZNER D.J.:

A pretrial conference in the above matter was held on Wednesday and Thursday, November 5, and 6, 1980.

During the course of the proceedings, a number of rulings were made by the court.

1. All claims relating to the wages and benefits provided in the standard television contract are removed from the case pursuant to the order of this court dated October 31, 1979. This contract may not be used to measure the substantive liability of the defendants. However, the contract may be referred to if it has any bearing on the issue of whether or not a designer is an independent contractor.

2. TTI is not the legal successor of FSSI and reference may not be made in the trial to the bankruptcy of FSSI. However, Feller's individual knowledge concerning the

labor relations in this industry prior to 1975 may be referred to, if necessary.

3. The plaintiff will be referred to during this trial as a scenic supplier. The contract in issue in this litigation will be referred to as the scenery suppliers' contract. The two categories of employees involved in this litigation are scenic designers and scenic artists.

4. The plaintiff is engaged in interstate commerce in the scenery construction market.

5. There is a question under the contract of June 24, 1973, as to whether it prevents the employer from hiring scenic designers other than for television production. Compare paragraph 1 with paragraph 9(d).

6. Under the allegations of the complaint paragraph 18 of the contract is not attacked as an illegal clause, nor relied upon to support a finding of restraint of trade.

7. The most favored nation clause is not a restraint of trade in the context of this complaint. It reflects only the basic position of the union regarding compensation and hours of labor. It exists in this contract between the union and the employers of the union's membership. It is obviously there for the protection of the employer who signs up with the union on the premise that the union will not thereafter give one of its competitors a better break.

8. The two main issues in this case are whether (a) the scenic designers are independent contractors, and (b) whether the per diem clause results in restraining competition between the shops within the metropolitan area and those outside that area.

9. Aside from some reference to monopoly in paragraph 11 of the complaint which on its face does not spell out a monopoly, and the last subparagraph (j) of paragraph 19 setting forth the effects of the conspiracy, this complaint is essentially one for restraint of trade based on the position of scenic designers and the per diem clause. This has also been true on the burden of the

arguments on the various motions which the court has decided and the papers that have so far been brought to the attention of the court. Consequently, I will strike any claim for monopolization under Section 2 of the Sherman Act.

10. The parties have agreed to resolve their differences over the first "OR" paragraph on p. 12 of plaintiff's pretrial order. There is nothing in the contracts alluded to in the last sentence of that paragraph which allocated the scenery construction market for the benefit of the alleged independent contractor members of United. In fact, this is the first time that this court has been made aware of contracts other than the standard scenery suppliers' contract and the television contract.

11. The defendants had requested that the plaintiff first produce proof of the fact that the scenic designers controlled the terms of the contract in issue. I agree with plaintiff that this would fragment his proof and he will be permitted to submit his whole case as he sees fit.

12. The trial of this case shall proceed solely on the issue of liability.

So ordered.

Dated: New York, N.Y.
November 7, 1980

s/Charles M. Metzner
U.S.D.J.

APPENDIX "D"
CHARGE OF THE COURT TO THE JURY

(In the courtroom, in the presence of the jury.)

CHARGE OF THE COURT:

THE COURT: Ms. Sierra and Ladies and Gentlemen of the jury:

We have now reached the point in this trial where you are about to enter upon your final function as jurors, which is, of course, one of the sacred duties of citizenship. You have given careful attention to the evidence during the course of the trial, and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed, and with impartiality and fairness reach a just verdict in this case.

In our court system the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is; it is your duty to accept the law as I state it to you. Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses, and the weight and effect to be given to their testimony. It is up to you to determine what the facts are from the evidence in this case, and from those facts decide whether the plaintiff has sustained its burden of proof on the claim which it has presented against the defendants.

This trial has been a relatively short one, and you have just heard the summations of counsel, in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in favor of their client.

I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

In determining the issues in this case it is your recollection of the testimony that is to control, and not that of counsel.

Statements made by counsel in arguing the admissibility of proposed evidence and colloquys between the Court and counsel with respect to admission or rejection of such evidence are not evidence and are not to be considered by you in your deliberations. The summations of counsel which you have just heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

If, during the course of this trial, I have sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question.

If a question has been asked and an answer given by the witness, and I have then stricken the answer from the record, you are to disregard both the question and the answer in your deliberations. The only evidence you can consider is sworn testimony and documents admitted in evidence.

Plaintiff is a corporation which produces theatrical scenery at its plant in Newburgh, New York, and is known as a scenic supplier. Peter Feller is the president and sole stockholder of the plaintiff. It employs members of the defendant Local 829 of the United Scenic Artists Union. Local 829 has negotiated a number of standard contracts covering the activities of its members, one of which is known as the independent scenery suppliers' contract. The individual defendants are Abraham Kanter, a former business agent of Local 829, Andrew Clores, a former business agent of the local, and Ben Edwards, who was a president of the local. The action has been discontinued as to defendants Clark and Cappiello.

The defendant union has a number of types of members. One classification is scenic designers. Another is

scenic artists. And then there are costume designers, lighting designers and so forth. The dispute in this case concerns scenic designers and scenic artists. Scenic designers as the name implies, design the sets for the theatrical productions. They produce sketches or scale models of the sets which the scenic supplier is called upon to construct. The scenic supplier employs scenic artists to paint those sets.

Plaintiff, a corporation acting through its president, Mr. Feller, complains that one clause in the union contract violates the provisions of the anti-trust laws. That is the per diem clause.

Mr. Feller testified that this is the only clause in the contract about which he complains.

The per diem clause has been detailed for you in the testimony and in the summations of counsel, and I see no point to repeat it.

Your sole function here will be to determine whether the plaintiff has proved by a fair preponderance of the evidence that the defendants have violated the anti-trust laws, and whether such violation has caused injury to the plaintiff.

You will not be asked to fix the amount of damages if you should reach a verdict in favor of the plaintiff.

A fair preponderance of the evidence is no more than the greater weight of the evidence, and this weight is determined by the quality rather than the quantity of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of either party. If the evidence is evenly balanced in your minds as to a defendant, then the plaintiff has not sustained the burden of proof as to that defendant, and your verdict must be for that defendant.

A special standard of proof is required as to one element of the claim against the union. Before you may find the union liable to the plaintiff, you must find that the

plaintiff has established by clear and convincing evidence that the acts allegedly performed on behalf of the union by the individual defendants or other members were authorized, ratified or participated in by the membership of the union or its executive board acting for the union. To find an individual defendant liable on a claim asserted by the plaintiff, you must find by a fair preponderance of the evidence that he was responsible for the illegal acts alleged. The liability of each defendant must be determined separately.

The antitrust laws provide that every contract, combination or conspiracy in restraint of trade or commerce is illegal. It is obvious that a contract between an employer and a union fixing hours of work and amount of wages to be paid must have an impact on the cost of merchandise produced and thus can restrain trade.

However, labor unions have a specific exemption from the provisions of the antitrust laws, if they are carrying out the legitimate objects of a labor organization and are not acting in combination with a non-labor group.

The legitimate object of a labor union is to secure for its membership the most advantageous contract with employers regarding wages, hours and working conditions. The per diem clause being considered here affects the wages of scenic artists. The per diem clause is not an illegal clause on its face, nor is it illegal if as a practical matter it might increase the labor cost of some scenic suppliers; nor can it be inferred to be illegal simply because a scenic artist living in the suburbs does not receive the per diem if he works in New York City, but does receive it if he works for an out-of-town shop closer to his residence. The clause only becomes illegal if the plaintiff proves by a fair preponderance of the evidence that it was put into the contract because of an agreement between the union or the scenic designers and the New York City shops to increase the labor costs of the out-of-town shops for the purpose of

restraining trade, or results from the scenic designers putting the clause in the contract for the sole purpose of conferring benefit on the designers and not for the benefit of the artists.

In addition to the statutory exemption, which I have just defined for you, labor unions have what is known as a non-statutory exemption. Even if the union does combine with a non-labor group, it may still be exempt from antitrust liability if the provisions of the contract in issue are intermittently related to wages, hours and working conditions, and do not have a potential for restraining competition in the marketplace in a way that would not usually be found in a labor contract.

Plaintiff has submitted three possible bases for your finding in its favor. The first question you should resolve is whether the scenic designers are employees or independent contractors. If they are employees, then Local 829 is simply a labor organization. If they are independent contractors, then they are a non-labor group within the local which must be viewed from a new perspective.

There is no single factor which determines whether a scenic designer is an employee or an independent contractor. The producers of theatrical presentations hire scenic designers. If the producer retains the right to direct the manner in which the scenic designer performs his work, as well as the result accomplished, this is an indication that the relationship is that of an employer-employee. On the other hand, if the scenic designer is not deprived of exercising his own judgment in carrying out his duties, he may be an independent contractor even though some control of the work is retained by the producer.

Another indication of the scenic designer's status is whether he supplies his own tools and place to work, and controls his own work time. Furthermore, a flat fee arrangement for doing the job instead of hourly or weekly wage as compensation would indicate that the scenic

designer is an independent contractor as opposed to being an employee.

Finally, you may take into account the understanding by the producer and the designer and all other people in the business of theatrical production what the status of the designer is—do the designers consider themselves as independent contractors? Do the producers consider designers as independent contractors?

You must balance and judge these various factors in light of the total situation in order to reach a conclusion on this issue.

If you find that the scenic designer is an employee, as I have said, then Local 829 is considered to be a labor organization and has the statutory exemption from the provisions of the antitrust laws, as long as it engages in lawful activity to carry out its legitimate objects.

I said before that the per diem affects the wages of the scenic artists. The negotiation for such a clause deals with a legitimate objective of a labor union.

A union in its contractual relations with employers need not treat all employers equally. Similarly, a union does not have to consider whether a particular employer can afford to pay the benefits it is seeking. The union does not violate the law merely because, in negotiating a contract, it makes unreasonable or arbitrary demands or asks for benefits which the employer regards as unfair.

However, if the demand for a per diem clause was not for the benefit of the scenic artists, but was inserted in the contract for the purpose of carrying out an agreement between the union and the New York City shops to prevent competition from the out-of-town shops, that would be an unlawful activity. It would be a restraint of trade for purposes other than the legitimate objects of the union and would cause the union to lose its exemption.

In connection with weighing the evidence on this issue, you may consider the testimony given by Mr. Feller

as to the signing of the 1973 contract, when he was the chairman of the Theatrical Contractors Association and signed the 1973 contract on its behalf, and at the time he signed the contract was operating a shop in New York City.

Thus, if you find that the union consists solely of employees and that plaintiff has shown by a fair preponderance of the evidence that the union conspired with the New York City shops to restrain trade, then you have disposed of one element in favor of the plaintiff on the first alternative ground it has asserted for recovery against the defendants. If plaintiff has not sustained his burden of proof on this alternative, your verdict should be for the defendants on this alternative.

If you find, however, by a fair preponderance of the evidence that the scenic designers are independent contractors, and thus a non-labor group within the union, this does not, by itself, deprive Local 829 of its exemption. You must still determine whether the per diem clause was negotiated for the benefit of the scenic artists or for the benefit of the scenic designers. Was it negotiated solely to provide wages and hours and working conditions for the artists or was it insisted on by the union solely for the personal benefit of the designers?

If you find by a fair preponderance of the evidence that the clause was negotiated for the benefit of the scenic designers and not for the benefit of the artists, then you have disposed of one element in favor of the plaintiff on the second alternative ground it has asserted for recovery against the defendants.

If plaintiff has not sustained this burden of proof on this alternative, your verdict should be for the defendants on this alternative.

In connection with weighing the evidence on this

issue, you should again consider Mr. Feller's testimony which I have just referred to.

Finally, we turn to the third alternative of plaintiff's claim, which is that the scenic designers agreed with the New York City shops to include the per diem clause for the benefit of the New York City shops to restrain trade by eliminating the competition of the out-of-town shops.

If you find by a fair preponderance of the evidence that the scenic designers conspired with the New York City shops to put this per diem clause in for that purpose, then you have disposed of one element in favor of the plaintiff on the third alternative ground it has asserted for recovery against the defendants. If plaintiff has not sustained his burden of proof on this alternative, your verdict should be for the defendants on this alternative.

You will notice that for each alternative I referred to the finding of one element.

The second element is that plaintiff is not entitled to recover simply by showing that the concerted activities of the union and the New York City suppliers or the scenic designers restrained interstate commerce in some degree. It must also show by a fair preponderance of the evidence that there was an unreasonable restraint.

In determining whether there was an unreasonable restraint, you must examine the anti-competitive purposes of the clause. This involves a finding that the suppliers outside of New York City have been unable to compete because of the per diem provision, and that the suppliers in New York City have obtained a substantially larger share of the market than they would have enjoyed if there had been no per diem clause.

You must find that the scenery business has become substantially less competitive as a result of the adoption of the per diem policy, and that the per diem clause has caused such a diminution in competition.

Finally, the third element requires plaintiff to prove by a fair preponderance of the evidence that some damage flowed from the unlawful acts of the defendant. Plaintiff must establish that the antitrust violation was a material cause or a substantial factor in causing damage to the plaintiff.

You must find that the per diem clause caused plaintiff to submit its bids on scenery construction jobs, jobs which caused it to lose business which it otherwise would have secured.

As I have said above, you are not concerned here with the amount of damage. You will only concern yourselves with the question of whether the plaintiff has proved by a fair preponderance of the evidence that he suffered damage.

In your search for the truth, you must use plain, everyday commonsense. You must not be governed by sympathy, bias or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. How did they impress you? Did they appear to be testifying frankly and candidly? In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying, and his interest in the outcome of the litigation.

Officers and employees of both the plaintiff and the union are interested witnesses as well as the individual defendants.

You may consider that fact in determining the weight and credibility to be given to their testimony.

However, it does not necessarily follow that merely because a person is interested in the result he is not capable of telling a truthful version of an occurrence.

If you believe that a witness wilfully testified falsely to any material fact, you may disregard the testimony altogether or you may accept such portion of the testimony as you believe worth of credence. What you ac-

cept or reject as credible evidence is for you to determine, but you may not go outside the evidence to speculate as to the facts.

During the trial of this case certain testimony has been read to you by way of deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility and weighed by you in the same way as if the witness had been present.

Now, there are, generally speaking, two types of evidence from which a jury may properly find as to the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—that is, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. Circumstantial evidence is the proof facts from which a fact in issue may reasonably be inferred.

You may draw such inferences as reason and common sense leads you to draw from facts which you find to have been proven.

Circumstantial evidence is not on any different or lower plane than direct evidence. No greater degree of certainty is required of circumstantial evidence.

The law simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

I have sought to avoid any comments which might suggest that I have personal views on the evidence. I have no views as to the facts of this case, and you are not to assume that I have any such views. This charge is given to you solely to instruct you as to the law applicable to this case.

The actions of the judge during the trial in ruling upon motions or objections made by counsel or in statements to counsel, or in attempting to clearly set forth the law in these instructions, are not to be taken by you as any indication of any determination of the issues of fact.

These matters, the actions of the Court, relate to procedure and law. You alone determine the facts.

There are six members of this jury and all of you must agree upon a verdict. If you should desire any of the exhibits, they will be sent to the jury room upon request.

If you want any of the testimony or any portion of this charge read, that can be done upon your request.

This case is obviously an important one to the plaintiff. It is equally important to the defendants. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide the case fairly and impartially and without fear or favor.

In addition to asking you to give a general verdict on the claims which are before you, I am submitting to you several written interrogatories which I will ask you to answer.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THEATRE TECHNIQUES, INC.,

Plaintiff,

v.

UNITED SCENIC ARTISTS LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, BEN EDWARDS, STAN CAPPIELLO, PEGGY CLARK, ABE KANTER AND ANDREW CLORIS,

Defendants.

Plaintiff, by their attorneys, for their complaint against defendants, allege as follows:

1. This action is filed under Section 15 of the Act of Congress of July 2, 1890, Ch. 647, 26 Stat. 209, as amended (15 USC §15), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants of Sections 1 and 2 of that Act (15 USC §1, ff.), damaging to plaintiff's business and property, to obtain an award of damages for the same and to obtain a declaration under 28 U.S.C. §2201, of the illegality of defendants' conduct hereinafter alleged under said Act of 1890 and/or under the common law, and/or other statute.

Jurisdiction is vested in this Court by virtue of 28 USC §§1331 and 1337. A federal question and an amount exceeding $10,000 is at issue.

2. The defendants are and they conduct the following businesses or activities:

(a) United Scenic Artists Local 829 ("Local 829") of the Brotherhood of Painters and Allied Trades, AFL-CIO, is an unincorporated local trade union of individuals chartered by, and operating under the authority of the AFL-CIO, an International labor organization. This local maintains a place of business in this judicial district.

Local 829 is composed of two major classes of members: artists ("artists") and designers ("designers"). The artists are primarily concerned with the painting and application of decorative materials to scenery used in theatrical, television film and similiar projects. The artists are employees of scenery construction shops. The designers are primarily concerned with the planning, supervising the execution and approving the purchases of the lighting, costumes and scenery used in theatrical, television film and similiar projects. The designers work on a fee basis, individually contract work, determine the manner and means by which their work is to be performed, and are independent contractors, and not employees within the meaning of Section 2 (3) of the National Labor Relations Act.

The membership of the local consists of many hundreds of scenic artists and designers who perform substantially all of the painting and designing of scenery in the New York City area and in most states East of the Mississippi River. Local 829 has sole territorial jurisdiction over the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida, together with the District of Columbia.

Construction of any scenery for professional theatrical plays and television programs to be produced in

the Greater New York City market area is impossible save through employment of the members of said local union which enjoy a monopoly of persons presently trained, fitted, and allowed by union agreements to follow the occupation of artists and designers in the area.

(b) Ben Edwards, Stan Cappiello and Peggy Clark are respectively President, Secretary-Treasurer and Vice President of Local 829, and Abe Kanter and Andrew Cloris are business agents of Local 829, and are members of or participate in the work of a negotiating committee of the local union defendant named above.

3. At all times hereinafter mentioned the plaintiff was and still is a corporation organized and existing under the laws of the State of New York with its principal place of business located in Newburgh, New York. The plaintiff is in the business of constructing and selling scenery used in stage, film, television and other productions, and competes with television network studios and other scenery construction shops located in New York City, and elsewhere, for said business. A major part of goods sold and produced by plaintiff are sold to customers in New York City and plaintiffs products are shipped in interstate commerce. Plaintiff purchases materials to construct its scenery from out of state vendors.

4. Members of the general public do not retain or employ designers and artists, this service is performed for them by scenery construction shops and theatrical, television and motion picture producers ("Producers") which employ and retain members of defendant-union. The service performed by producers in purchasing scenery from scenery suppliers, including the plaintiff, is an integral part, and necessary to the movement in interstate commerce of theatrical, television and motion picture productions which are produced in New York City. Producers are conduits through which scenery is purchased and shipped,

sold and distributed to the consuming and theatrical ticket buying public throughout the United States.

The construction and sale of scenery is part of, and necessary to the movement in interstate commerce of theatrical plays, television programs, and motion pictures exhibited in New York City and throughout the United States.

5. Any restraint upon or disruption in, or interference in the performance with the operation of scenery construction shops, including plaintiff, necessarily and directly restrains and affects the interstate flow of theatrical and television productions, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all said productions exhibited to and enjoyed by the general public.

6. Beginning at least 13 years ago and continuing thenceforth, defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among scenery construction shops and to prevent the sale of scenery in the New York City area by scenery shops located in different areas, in unreasonable restraint of trade and commerce among the several states in violation of Section 1 of the Sherman Act, and to monopolize or attempt to monopolize for the members of the defendant union and certain favored employers and independent contractors a portion of the trade or commerce in violation of Section 2 of the Sherman Act.

7. Local 829 enters into a number of standard contracts with employers in the plaintiff's industry. One among them is called the scenery suppliers contract and another is called the television contract. Each standard contract has the same wage rates and other terms and conditions of employment. The standard scenery suppliers contract contains a "most favored nations" clause, and provision for added compensation to be paid to artists

members of Local 829 only by scenery shops located outside the immediate area of New York City. The rates of pay, cost of benefits and other provisions are much more favorable to the employer in the standard television network contract than in the standard scenery suppliers contract. The standard television network contract is used and entered into by Local 829 only with the Columbia Broadcasting System, the National Broadcasting Company and American Broadcasting Company, all of which are located in New York City.

Plaintiff shows that there is no basis for the aforesaid different rates of compensation, and that such is part of a discriminatory scheme to allocate the scenery market, and impose a direct restraint on competition among scenery construction shop by means of differences in wages and working conditions.

All the artists members of Local 829 are required to pass exactly the same examinations and possess the same membership qualifications. The work required of all of them in New York City and outside New York City, and for theatrical and television productions is the same, that is the painting of scenery from sketches supplied by the designer members of Local 829. The same artists do work in New York City and outside New York, and the same artists work under the scenery suppliers contract as do work under the television contract.

All the signatories to the scenery suppliers contract, whether they are located in New York City, or elsewhere including the plaintiff, bid and compete for the same work. Those employers, including the plaintiff, who are signatories to the scenic suppliers contract bid for and compete with the signatories to the television contract for the same work. There are no distinctions within Local 829 among its artists members in respect those who paint scenery in New York City, or outside New York City, or paint theatrical scenery, or paint television scenery. Many,

if not most, artists members of Local 829 do not reside within 10 miles or 30 minutes of the scenery shops located in New York City.

8. Local 829 enforces its directions to its artist members not to paint scenery which was not designed by a designer who is a member of Local 829, and prohibits its designer members from designing scenery which is to be painted by artists who are not members of Local 829.

Local 829 prescribes the standard, contract and minimum fees applicable to designers, and requires that said design contracts be filed with Local 829, in order to insure that no scenery is provided by a scenery supplier not a signatory to a contract with Local 829.

9. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and their co-conspirators. The substantial terms of which have been that they agree:

(a) That no person or firm be permitted to engage in the construction and painting of scenery unless they retain designers, independent contractors, who are members of Local 829.

(b) That Local 829 and its officials and representatives named herein refuse to allow members of their organization to paint scenery not designed by members of Local 829.

(c) That preferential contract terms, resulting in reduced costs are to be enjoyed by selected employers.

(d) The co-conspirators of defendants have agreed with Local 829 and among themselves to insist that all collective bargaining agreements entered into between them and defendant union or between defendant union and plaintiff or other operator of scenery shops contain provisions furthering the illegal conspiracy.

(e) Local 829 its members, and officers have conspired and agreed with the other conspirators that

neither plaintiff nor any other scenery shop located outside New York City is to be permitted to compete lawfully with scenery shops located in New York City.

(f) That defendant-union, its officers, and members have acted as the enforcing agent of the conspiracy.

10. Defendants and their co-conspirators, by agreement and concert of action, have done the things which, as hereinbefore alleged they conspired to do, and, more particularly, have done, among others, the acts and things hereinafter described.

11. For many years past Local 829 its officers, and members, conspiring together with New York City scenery shops have agreed that all collective bargaining agreements entered into between Local 829 and operators of scenery shops be identical, and have insisted that the bargaining between all such operators (or their representatives) and the unions be carried on simultaneously and have exercised their monopoly powers to effectuate that agreement.

12. For many years past, said New York City scenery shops and Local 829 its officers, and members, have agreed despite public interest to the contrary that contracts between Local 829 and all operators of scenery shops contain provisions favoring scenery shops located in the New York City area.

13. In furtherance of this conspiracy, in 1973, when operators of scenery shops had collective bargaining agreements with Local 829 which expired on June 30, 1973, the defendant-union summoned all such operators to meetings for the purpose of negotiating new agreements and insisted that they sign identical agreements.

14. Local 829 threatened to strike and picket any operator who refused to sign a contract which did not contain identical terms and plaintiff believed, and alleges, that such strike threat was made with authorization of the

members of the union and would have been carried into effect against any operator had it not yielded. Plaintiff shows that no scenery shop could have operated without the service of numerous members of the defendant-local normally employed by it. Plaintiff further shows that such a strike and picketing would have inflicted great and severe damage upon the scenery shops involved and would, in many areas, have caused great public inconvenience because other unions engaged in delivering and servicing them would have honored such picket lines and within a short time non-complying scenery shops would have been unable to offer their products for sale. Under the compulsion of the conspiracy and the aforegoing circumstances all the scenery shops involved were forced to sign, in June 1973, a contract with Local 829 which included the following:

(a) *"No More Favorable Contracts with Others:*
To maintain equitable competitive standards within the industry, no agreement providing for minimum wages lower than, or maximum hours higher than those provided herein will be made by Local 829 with any independent contractors furnishing scenery to theatres, networks and film studios".

(b) Paragraph 18 of the Scenic Suppliers contract provides that should the employer engage in the production of scenery for films or television productions, the employers is required to engage a separate crew of men for each such production and for such separate crews the employer shall conform to the Union's film or television contract. However, in no event may the employer compensate the union's members less than the existing rates stated in the scenic suppliers contract.

(c) The Union requires employers with whom it has a scenic suppliers contract to comply the following provisions of paragraph 12 thereof, which affects only

employers located outside the "Metropolitan area" of New York City:

> When a member travels to a shop outside the immediate Metropolitan area and returns home the same day, he shall receive $30.00 per day in addition to his pay, plus reimbursement for transportation or in the alternative, *and at the employer's option* he shall receive travel time and reimbursement for transportation expenses in addition to his pay.
>
> When a member lives within 10 miles or 30 minutes of a shop outside the Metropolitan area no per diem will be paid unless he is required to stay overnight in which case he will receive $30.00 additional per day. When he lives within these bounds no expenses or travel time will be paid. This paragraph shall not affect or change any of the preceding or following paragraphs.

Such contract was effective on June 24, 1973 and extends to November 30, 1976.

15. The plaintiff was incorporated in 1975 and shortly thereafter its president requested that the Union negotiate a contract with it. The Union, by its duly authorized business agent and officers, refused to negotiate a contract with the plaintiff, and stated that the aforesaid "favored nations" clause in its Scenery Suppliers contract precluded the Union from negotiating a different contract with the plaintiff because such would violate its agreement with the employers who were party to the Scenery Suppliers contract.

16. In August, 1975, defendant Abe Kantor caused a meeting of sundry officials of Local 829 to be held for the purpose of announcing that he and the other defendants would not enter into any agreement with plaintiff other than that signed with other scenery shops in 1973, and that if plaintiff did not agree and continue to obey the terms of said agreement that the defendant local would not proceed under the arbitration provisions of the contract but would

"pull", i.e., remove the artists from service in plaintiff's shop, and thereby prohibit designers from doing business with plaintiff, for such period of time as the defendant local felt necessary to secure future obedience to provisions of the contract. Plaintiff shows that said announcement is a strike and boycott threat, that it has not been withdrawn and that it verily believes defendants were and are prepared to and would carry out said threat if plaintiff did not sign and comply with the aforesaid contract.

17. The plaintiff objected to the refusal of the defendants to negotiate a contract with it, and also the granting by Local 829 of more favorable conditions to the television networks with whom the plaintiff would be competing. The defendants rejected the plaintiff's objections, refused to negotiate the subject, and demanded that the plaintiff sign the existing standard Scenic Suppliers contracts without change. Consequent to threats made by the defendants and the pressure available to Local 829 because of its contracts with customers of plaintiff, theatrical television producers, and through the designers who are members of Local 829 the plaintiff signed the said standard suppliers contract "under protest".

18. The plaintiff's shop is located outside the "Metropolitan area" as defined in the said Scenery Suppliers Contract. Therefore, by the terms of said contract, the plaintiff was required and did pay to its employees, who are members of Local 829 the travel and per diem allowances, stated in the contract. The total of these allowances amount to many thousands of dollars each year and prevent the plaintiff from effectively and lawfully competing with employers located in the "Metropolitan area" of New York City, who do not have the obligation to pay the travel and per diem allowances to their employees, who are members of Local 829 and live more than 10 miles or 30 minutes from their place of employment.

19. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The right of plaintiff to compete in the New York City area has been unlawfully restrained and impeded.

(b) The public has been denied the benefits of competition among scenery construction shops free from illegal restraints.

(c) The flow in interstate trade and commerce of theatrical productions has been unlawfully restrained.

(d) Plaintiff has been restrained from utilizing its rights to full use of its own property and facilities without hindrance by illegal restraints.

(e) The cost of scenery has been held higher than it otherwise would be which has resulted in higher prices to the consuming public.

(f) Plaintiff has lost profits in a large amount, difficult to ascertain exactly but in excess of $200,000, which it would have gained in the absence of defendants' unlawful conduct.

(g) The aforesaid "favored nation's clause" in the standard scenery supplier's contract between Local 829 and plaintiff has the effect of creating a sheltered market for scenery construction shops in New York City because the Metropolitan area, as defined therein is restricted to the New York City boroughs of Manhattan, Bronx, Brooklyn, and Queens, and any area within a 10 mile radius of Columbus Circle in New York City.

(h) By reason of the aforesaid "favored nations clause" and threats made by the defendants, the plaintiff was and is coerced into reimbursing members of Local 829 for travel expenses not incurred by them.

(i) Through strikes and labor disturbances and threats thereof, defendants have wilfully, knowingly, and

repeatedly induced and attempted to induce, and by the same means and methods now do induce plaintiff to comply with the prejudicial terms of its contract with Local 829.

(j) The Union, through its contracts with the television networks, and other scenic suppliers, and designers, has enforced an anticompetitive scheme to allocate the television and theatrical scenery market and to monopolize the entire scenery construction business in New York City, for the benefit of employers located in New York City, all to the detriment of the plaintiff.

20. The character of the unlawful acts done and being done by the defendants pursuant to the combination and conspiracy hereinabove described, is such that the respective property rights of the plaintiff are injured as aforesaid by such acts, to continue to engage in interstate commerce without molestation or interference, cannot be protected by the police or other public officers ordinarily charged with the duty of protecting property, and said plaintiff will suffer great and irreparable damage unless the above described combination and conspiracy, and the acts done and being done by the defendants in furtherance thereof, be declared to be unlawful, and (in as much as said plaintiff have no adequate remedy at law) an injunction in the form hereinafter prayed for be granted.

21. The plaintiff has complied with all valid obligations imposed upon it by the statutes of the United States with reference to the matters herein complained of, and have made all reasonable efforts to adjust the differences existing between it and the defendants hereinable described and any further efforts at settlement would be futile and unavailing. With respect to any and all relief herein sought, the denial of such relief will inflict greater injury

upon the plaintiff than will be inflicted upon the defendants by the granting thereof.

WHEREFORE, the plaintiff demands judgment against the defendants as follows:

(1) That, as provided in Section 2201 of the Judicial Code, this Court declare the said conspiracy and all the acts done and being done in furtherance thereof as aforesaid, to be unlawful and contrary to the Act of Congress of July 2, 1890 entitled an "Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Law, as amended and supplemented.

(2) That as and for further relief pursuant to Section 2201 of the Judicial Code aforesaid (there being no adequate remedy at law in the premises), the defendants, Local Union No. 829 Ben Edwards individually and as President thereof, Stan Cappiello individually and as Secretary-Treasurer thereof, Peggy Clark, individually and as Vice-President thereof, Abe Kanter individually and as Business Agent thereof, and Andrew Cloris individually and as Business Agent thereof, and their and each of their agents, servants, attorneys and confederates and the members of said Local Union No. 829 and all persons acting in aid of or in conjunction with them, or any of them, be perpetually enjoined and restrained from in any manner combining and conspiring to obstruct, restrain, or interfere with the interstate trade or commerce of the plaintiff in any one or more of the kinds of scenery manufactured by them by:

(a) Inducing or seeking or attempting to induce any person, firm or corporation to refrain from purchasing or from agreeing to purchase any scenery from plaintiff.

(b) Inducing or seeking or attempting to induce any person, firm, or corporation to refrain from performing or carrying out any contract, agreement or understanding,

whether oral or in writing, for the purchases from the plaintiffs of any scenery.

(c) In any manner whatsoever diverting or seeking or attempting to divert from the plaintiffs any business, contracts or orders for or relating to the aforesaid scenery produced by said plaintiff or said members, or any of them, upon the ground that it was not designed by a member of Local 829.

(d) In any manner or by or through any acts or means preventing the plaintiff from securing orders for or making sales of any of the scenery manufactured by it upon the ground that such scenery is wholly or partially constructed in the factory of said plaintiff outside the Metropolitan Area aforesaid.

(e) Inducing, ordering or in any manner or by or through any means or methods requiring any producer or other possible or potential purchaser of any of the scenery to execute or enter into or to observe, carry out, or perform any contract, agreement, or understanding which in substance or effect requires such producer or purchaser not to purchase such scenery from the plaintiff.

(f) Inducing, ordering, directing, or requiring any person or persons to refuse to handle, or work upon any of the scenery produced by the plaintiff while said person or persons are permitted to handle or work upon similar products made, or sold by any competing manufacturer or manufacturers within the Metropolitan area aforesaid.

(g) Adopting, promulgating, maintaining, or enforcing any rule or regulation forbidding the members of the defendant Local Union No. 829 or any of them to handle, connect, or work upon any of the scenery mentioned in subdivision (a) hereinabove referred to, and produced by plaintiff and from fining, expelling, or otherwise disciplining any of said members from disobeying any such rule or regulation.

3. That a temporary injunction of the same tenor and effect as the permanent injunction herein prayed for issue out of this Court to continue in full force and effect until and during the trial of this action.

4. That the prejudicial payments which are required of plaintiff because it is located outside New York City be declared illegal, null, and void, and that defendants be enjoined from enforcing such provisions, any other rule, contract, or restriction having a similar effect or purpose.

5. That the defendants, and each of them, be enjoined from harassing intimidating, hindering, striking, or picketing plaintiff for the purpose of enforcing the illegal terms of its contract with plaintiff.

6. That plaintiff be awarded treble damages in the total amount of $600,000 and costs and disbursements, and attorneys' fees.

7. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem appropriate.

Crossin & Crossin

By s/ William Crossin
A Member of the Firm
Attorneys for Plaintiffs
Office and P.O. Address
65 Prospect Avenue
Larchmont, New York 10538
(914) 834-5441

Dated: Larchmont, New York
November 29, 1976

Opposition

Office-Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

No. 81-1797

THEATRE TECHNIQUES, INC.,

Petitioner,

– against –

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL E. ABRAM
Of Counsel:
Bruce H. Simon
Keith E. Secular

COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
Tel. (212) 563-4100

Attorneys for Respondents

Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-840-1891

QUESTION PRESENTED

Whether, in unanimously affirming the verdict and judgment for respondents, the court below erred in rejecting petitioner's objections to the trial court's evidentiary rulings, jury charge, and special interrogatories?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
STATEMENT OF THE CASE	1
Parties	2
TTI's Conspiracy Claim	2
Proceedings Below	4
REASONS THE WRIT SHOULD BE DENIED	5
CONCLUSION	7

No. 81-1797

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THEATRE TECHNIQUES, INC.,

Petitioner,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In this action an employer, Theatre Techniques, Inc. ("TTI") claimed that a union, United Scenic Artists, Local 829 ("Local 829" or "the Union"), violated the Sherman Act by conspiring with TTI's competitors to restrain trade. The claim was rejected by a jury. Judgment for the Union

was unanimously affirmed by the court of appeals.

Parties

Petitioner TTI is a theatrical scenery supplier in Newburgh, New York. Its president and sole stockholder is Peter Feller. Immediately prior to opening TTI in 1975, Mr. Feiler owned and operated Feller Scenery Studios, Inc. ("Feller Scenery"), in New York City.

Respondent Local 829 represents scenic artists employed by scenery suppliers to paint, sculpt and decorate scenery.*

TTI's Conspiracy Claim

In 1973 Local 829 negotiated a three year collective bargaining agreement with eight scenery suppliers, including Feller Scenery, who had joined together as Theatrical

*The individual respondents are the president and former business representatives of Local 829.

Contractors Association, Inc. ("TCA").* Mr. Feller was president of the TCA and executed the agreement for the employers. (A 292, 339, 373).**

The TCA agreement provided that scenic artists called to work outside the metropolitan area of New York City would receive travel expenses and a per diem allowance in addition to their base pay. In 1975, when Mr. Feller closed Feller Scenery in New York City and reopened as TTI in Newburgh, he demanded that Local 829 eliminate the per diem allowance for his regular scenic artists. To preserve an important benefit for its members, the Union refused. (A 604, 650-1, 788-9).

The complaint sought treble damages

---

*TCA consisted of five suppliers located within the immediate vicinity of New York City and three suppliers located substantial distances from New York City.

**References denoted "A__" are to the joint appendix in the court of appeals. "Pet.__" refers to the petition herein. "Pet. App.__" refers to the appendices to the petition.

based on TTI's per diem payments. It alleged that the per diem clause was the result of an illegal conspiracy between the Union and the New York City scenery suppliers to eliminate competitors located outside New York City by imposing upon them higher labor costs. TTI further alleged that scenic designer members of the Union, who were "independent contractors," participated in the conspiracy.* (Pet. App. D 12-23).

Proceedings Below

On November 24, 1980, the jury returned its verdict for defendants and, in response to special interrogatories, specifically found that TTI failed to prove that the per diem provision of the agreement resulted from a conspiracy between Local 829 and New York City shops or scenic designers. (Pet. App.

*The complaint also contained a separate claim that Local 829 had conspired with the three national television networks. This claim was dismissed by the trial court prior to trial. TTI did not appeal this dismissal.

B 3).* Judgment was entered November 26, 1980. (Pet. App. B 1). The Second Circuit unanimously affirmed in an unpublished decision, October 16, 1981. (Pet. App. A).

REASONS THE WRIT SHOULD BE DENIED

This is a conventional antitrust case involving nothing beyond petitioner's failure to prove its conspiracy claim. The rulings cited in the petition involved only particular questions of evidence and procedure all of which were correctly resolved.

1. In affirming the trial court's exclusion of the "most favored nations clause" from the case, the court of appeals did not establish any "principles of labor/antitrust law [or] due process" as contended

*As the trial court observed to counsel, TTI presented "not an iota of proof" that Local 829 had conspired with the New York City suppliers. (A 576). Although Mr. Feller took the stand he was not asked any questions on the conspiracy issue. By contrast six Union witnesses who participated in the matters at issue -- including the Union's former attorney -- denied TTI's conspiracy accusations. (A 595-96, 655, 689-90, 702-03, 741-42, 745, 768-72, 791, 795, 856, 860).

by TTI. (Pet. 13-19). The court merely held that the clause "was on its face independent of the per diem clause...[and], as a result, irrelevant to the resolution of appellant's claim". (Pet. App. A 2).*

2. Similarly, no substantive anti-trust issue was raised by the admission of evidence concerning the lower rent and other non-labor costs of the suppliers outside New York City (Pet. 20-21). This evidence was material to TTI's contention that it could not compete because of the per diem allowance. Moreover, TTI was not prejudiced since it failed to prove the threshold conspiracy claim.

---

*The favored nations clause provided that "no agreement providing for minimum wages lower than, or maximum hours higher than those provided herein will be made by Local 829 with any independent [scenery suppliers]". (Pet. App. D 19). TTI's claim for relief did not involve the minimum wage scales or maximum hours provisions of the agreement. The sole subject of its complaint was the per diem allowance, a distinct fringe benefit not covered by the favored nations clause.

3. TTI's remaining contentions are that the jury instructions and special interrogatories were improperly phrased (Pet. 23-25); that TTI preserved its objections to the jury charge (Pet. 26-27); and that TTI was entitled to a directed verdict (Pet. 27-29). As the Court of Appeals found, no significant issues are presented by these contentions. (Pet. App. A 2-3).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL E. ABRAM
Of Counsel:
Bruce H. Simon
Keith E. Secular

COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
Tel. (212) 563-4100

Attorneys for Respondents

April, 1982

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEATRE TECHNIQUES, INC.,

Petitioner,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

WILLIAM J. CROSSIN
65 Prospect Avenue
Larchmont, N.Y. 10538
(914) 834-5441

Counsel for Petitioner

Dick Bailey Printers 290 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

TABLE OF CONTENTS

Page

Table of Authorities i

Introduction 1

I. The circuit court established principles of labor/antitrust law and due process contrary to the decisions of this Court 2

II. United's claim that a conspiracy was not established is not accurate 5

Conclusion 8

TABLE OF AUTHORITIES

Cases: *Pages*

Allen Bradley Co. v. Local 3 Int'l Brotherhood of Electrical Workers, 325 U.S. 797 (1945) 3

Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959) 3

Connell Construction Company, Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 2,3,4,5,8

Continental Ore Co., et al. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 3

Federal Maritime Commission v. Pacific Maritime Assn., 435 U.S. 40 (1978) 4

Norfolk Monument Co. Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969) 3,7

Ramsey v. United Mine Workers of America, 401 U.S. 302 (1971) 2

Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (1953) 7

Theatre Techniques v. United Scenic Artists, Local 829, 1980-81 CCH Trade Cases ¶63,031 (S.D.N.Y. 1979) 4,7

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 2,3,4,5

United States v. Paramount Pictures Inc., 334 U.S. 131 (1948) 7

West v. Smith, 101 U.S. 263 (1869) 3

No. 81-1797

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THEATRE TECHNIQUES, INC.,

Petitioner,

-against-

UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES AFL-CIO, BEN EDWARDS, ABE KANTER, and ANDREW CLORES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Petitioner Theatre Techniques, Inc. ("TTI") submits this brief in reply to the opposition brief of Respondents United Scenic Artists, Local 829, etal. ("United").

United attempts to avoid review by asserting that the Petition concerns a "conventional antitrust case" and "involve(s) only particular questions of evidence and procedure." This tactic is simply an exercise in wishfu. ninking. We respectfully submit that the Petition proposes some of the more significant labor-antitrust issues to reach this Court during the past decade, and that the writ of certiorari should issue because of the need for clarification of this complex area of the law.

In its brief United has attempted to downplay the significance of the questions at issue by inaccurately presenting them, or simply avoiding them. Herein, TTI will address the points raised in United's brief.

I. The Circuit Court Established Principles Of Labor/Antitrust Law and Due Process Contrary To The Decisions Of This Court.

United's brevity is matched only by its audacity. It claims the courts below did not establish new principles of labor antitrust laws and due process in regard to excluding the favored nations clause in the TCA-United agreement from the jury. This clause was held by the District Court to be for the benefit of the employer signatories to that contract *vis a vis* employers (*e.g.* TTI) not part of the bargaining unit.

Thus, the holdings of the courts below are a direct contradiction of the substantive principles of labor-antitrust law established by this Court's decisions in *United Mineworkers of America v. Pennington,* 381 U.S. 675 (1965); *Ramsey v. United Workers of America,* 401 U.S. 302 (1971); and *Connell Construction Company v. Plumbers & Steamfitters, Local Union No. 100,* 421 U.S. 616 (1975) which are discussed at pages 13 to 15 of the Petition.

United tacitly concedes that the trial court's exclusion of the most favored nations clause is at odds with *Pennington* and *Connell,* but states that "the [Second Circuit] merely held that the clause 'was on its face independent of the [non-New York City shop surtax]' ", which drove TTI out of business.

There are three palpable errors in that holding, and none of them can be dismissed simply as "evidence and procedure." First, there is nothing about the favored nations clause, "on its face" or otherwise, to support this

finding of "independence". Second, the trial court charged the jury that the surtax *was* a wage and thus subject to the non-statutory exemption (D6)—and by its express terms, the favored nations clause itself. Third, as this Court itself noted in *Connell,* the competitive effect of a favored nations clause cannot and should not be decided from simply reading its terms. See 421 U.S. at 623, n. 1.

Similarly, the exclusion of this clause from the jury, and the dual meaning given "wages" to accomplish such, were far more than mere procedural errors as was held by this Court in *West v. Smith,* 101 U.S. 263 (1869), *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969); *Continental Ore Co. et al v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962) and *Beacon Theatres v. Westover,* 359 U.S. 500 (1959), which are discussed at pages 15 to 19 of the Petition.

In order to make the exclusion of the favored nations clause appear to be a procedural error United omits from its quotation of the clause, the first part of it which states its purpose: "In order to maintain equitable competitive standards in the industry, . . .".*

This Court's decisions in: *Allen Bradley Co. v. Local 3, Int'l Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *Pennington, supra; Connell, supra;* and *Federal Maritime Commission v. Pacific Maritime Ass'n.,* 435 U.S. 40 (1978), which are discussed at page 21 of the Petition, hold that a union cannot join with a non-labor group to give the latter a competitive advantage even when the union believes that some good may come to the union. If this was permitted, the whole economy would be in the hands of a few union leaders, or as Justice Douglas stated

---

*Also omitted from United's quotation of the clause is its caption ("No More favorable Contracts With Others") which contradicts the Second Circuit's holding as to the effect of the clause.

in *Pennington:* "Congress can design an oligarchy for our society" but not "business and labor working hand-in-hand". (381 U.S. at 674).

Likewise, the introduction of nonlabor operating costs of the competing shops, over the objection of TTI, was hardly "an evidentiary or procedural" error. The trial court itself recognized that this evidence was offered as justification for the per diem or non-New York City surtax. (Petition p. 20) Such a defense was condemned by this Court in *Connell* and *Federal Maritime.* Also, the district court held that there never was any issue here concerning the anticompetitive effect of the per diem, or that it was a restraint of trade:

> ". . . the anti-competitive effect of the increased cost of labor to firms outside of New York City is obvious. The fact that [TTI] has survived may merely prove its tenacity. It does not show the lack of any restraint." (C5)*

Moreover, whatever savings TTI may have made by being in Newburgh rather than in New York City certainly would not have been pertinent to a trial confined to liability as was the one below.

Therefore, despite the fact that the expressed purpose of the favored nations clause was to directly affect competition among signatories to the United contract, the Circuit Court ignored the decisions of this Court that such a restraint was illegal, and held that the clause was irrelevant. The consequences of this holding are that the theatrical industry in the Eastern United States is subject to an illegal oligarchy and, absent a ruling by this Court,

---

*Parenthetical references preceded by letters "A" to "D" indicate pages in the Appendices attached to this petition. The numerical references indicate pages in the appendix filed in the Circuit Court.

subsequent cases of this nature are subject to similar treatment by the courts below.

The present Petition offers this Court an opportunity to reaffirm the sound precedents which it set in *Pennington* and *Connell* regarding the pernicious use of the favored nations clause in management-labor contracts. The decision below, if permitted to stand, would effectively negate those decisions, and permit labor unions and favored employers to fix prices, exclude competition, and protect markets under the guise of "collective bargaining."

II. United's Claim That A Conspiracy Was Not Established Is Not Accurate.

The charge to the jury stated principles of law contrary to the decisions of this Court, and made it logically impossible for the jury to find that United had forfeited its exemptions from the antitrust laws as discussed at pages 23 to 25 of the Petition. United's claim that a conspiracy was not established is simply not true.

At trial, United's principal witness, Abe Kanter, testified that the attorney for TCA, not Peter Feller, represented TCA in the negotiations (740), and a TCA member testified that Peter Feller played a very little part in the negotiations or the running of TCA (374). Further, the lack of good faith in United's argument is documented by United's claim during the trial that these conversations were irrelevant. The following is from the direct examination of Peter Feller:

"Q. Was that the [1973] contract signed by Theatrical Contractors Association?

A. Yes.

Q. Who signed it on their behalf?

A. I did.

Q. In doing so, would you tell us the circumstances how you came to sign the contract?

A. After the final negotiation, the Contractors Association met, there was a discussion, a vote, and an agreement to sign.

Q. How many votes were cast for and against the contract, do you recall?

MR. ABRAM: Objection, your Honor.

THE COURT: Sustained.

Q. Were the terms of the contract discussed among the members?

A. Yes.

MR. ABRAM: Objection. It is not relevant.

THE COURT: They signed the contract." (292-293)

Although Peter Feller was precluded at trial from offering any further testimony as to the discussions among the TCA members by United's objection, enough of his testimony was permitted to establish that the New York City shops knowingly voted for, and agreed to, the favored nations and the per diem provisions. The former insured the New York City shops that United could give no different contract to their competitors. The latter penalized the non-New York City shops to the competitive advantage of the New York City shops.

It should be noted that United's jurisdiction extends from Maine to Florida and encompasses both the New York City scenery shops and the "out-of-town" shops. Neither the favored nations clause nor the per diem clause serves to preserve jobs or even provide additional work for United's artist (employee) members. The per diem is not based on the time that a man spends getting to work, but is based on where the employer is located. Its operative factor is not any service by, or inconvenience to, the employee, but is the location of the employer outside of New York City. No matter which shop gets the work, there are no additional jobs for United's artists. In fact,

the per diem is counter-productive to the interests of the artists working at the "out-of-town" shops because it eliminates their jobs (303, 402) and their mobility to live where they choose to live (646).

Conversely, the TCA members were New York businessmen, who discussed the contract, voted on it, and agreed to sign it. It is clear that they, like the District Court, before the trial, recognized the advantage of this agreement to the New York City shops: ". . . the anti-competitive effect of the increased cost of labor to firms outside of New York City is obvious." (C5). There was ample basis for the jury to find a conspiracy. *United States v. Paramount,* 344 U.S. 131, 142 (1948); *Norfolk Monument v. Woodlawn Memorial Gardens,* 394 U.S. 700, 702 (1968).

Further, any opportunity for additional testimony on the subject was eliminated by United's objection that such was "not relevant". Therefore, it should not now be permitted to claim that such testimony was crucial:

> "[A] party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." *Scarano v. Central R. Co. N.J.,* 203 F.2d 510, 512-13 (1953).

Finally, a comparison of this Court's description of the "favored nations" clause in *Connell, supra,** to the District Court's description of the favored nations clause presently at issue,** makes it clear that the clause here met this Court's definition of "concerted action or agreements" that are not protected by the labor exemptions from the antitrust laws. *Id.*, 416 U.S. at 622-623.

CONCLUSION

For these reasons a writ of certiorari should issue to review the jugdment of the Second Circuit.

Respectfully submitted,

WILLIAM J. CROSSIN
Counsel for Petitioner
65 Prospect Avenue
Larchmont, New York 10538
(914) 834-5441

May 5, 1982

---

*"The primary effect of the agreement seems to have been to inhibit the union from offering any other employer a more favorable contract." 421 U.S. at 616 n.1.

**"It is obviously there for the protection of the employer who signs up with the union on the premise that the union will not thereafter give one of its competitors a better break." (C26).